SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 1046

PEOPLE OF THE STATE OF ILLINOIS ex rel. GEORGE MUSSO, Madison County Treasurer and Ex-Officio Collector of Taxes of Madison County, Illinois,
Appellants,

vs.

CHICAGO, BURLINGTON AND QUINCY RR. CO., CHICAGO & NORTHWESTERN RR. CO., GULF, MOBILE AND OHIO RR. CO., CHICAGO AND EASTERN ILLINOIS RR. CO., ILLINOIS CENTRAL RR. CO., NEW YORK CENTRAL RR. CO., NEW YORK, CHICAGO & ST. LOUIS RR. CO., WABASH RR. CO., PENNSYLVANIA RR. CO., ILLINOIS TERMINAL RR. CO., ALTON & SOUTHERN RR. CO., and TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Appellees.

On Appeal from the Supreme Court of Illinois.

JURISDICTIONAL STATEMENT.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No.

PEOPLE OF THE STATE OF ILLINOIS ex rel. GEORGE MUSSO, Madison County Treasurer and Ex-Officio Collector of Taxes of Madison County, Illinois,
Appellants,

vs.

CHICAGO, BURLINGTON AND QUINCY RR. CO., et al.,
Appellees.

On Appeal from the Supreme Court of Illinois.

JURISDICTIONAL STATEMENT.*

The People of the State of Illinois appeal from forty-six judgments of the Supreme Court of Illinois reversing forty-six judgments of the Circuit Court of Madison

* This document is unavoidably long. The cases involve judicial value finding in the property tax field on constitutional levels of national importance. The opinions of both the trial court and the Supreme Court of Illinois occupy 44 pages. A highly significant decision of February 1, 1966, by Federal Judge William E. Miller of the Middle Eastern District of Tennessee occupies 18 pages. Emphasis is added in this Statement unless otherwise explained.

County, Illinois, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeals and that substantial questions are presented. This Statement is also intended to include the material appropriate in a petition for certiorari. 28 U. S. C., §§ 1257 (3), 2103, **Flournoy v. Weiner, 321 U. S. 253, 263 (1944); Prudential Ins. Co. v. Cheek, 259 U. S. 530, 547 (1922).**

CITATIONS TO OPINIONS BELOW.

The opinion of the Supreme Court of Illinois reported in **33 Ill. 2d 88 (1965) and 210 N. E. 2d 196 (1965)** is printed as Appendix A at A 1-15 *infra*. The opinion of the trial court is not reported but is printed as Appendix B at A 16-44 *infra*.[1] The forty-six judgments of the Supreme Court of Illinois are essentially identical and one of them is printed as Appendix C at A 45 *infra*. The form of trial court judgments is appended to the trial court's opinion. Appendix B at A 37-44 *infra*.

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[1] It is in the form of a statement of reasons filed in the Record on Appeal to the Supreme Court of Illinois. Illinois Supreme Court Rule 36 (1) (3). Ill. Rev. Stat. ch. 110, § 101.36 (1965). The transcript of the Record filed with this Court pursuant to Rule 13 consists of virtually all of the proceedings before both the trial court and the Supreme Court of Illinois. The Record on Appeal to the Supreme Court of Illinois consists of forty-six "short records" and a consolidated trial and appellate Record consisting of four volumes of testimony (I-IV Test.), twelve volumes of exhibits (I-XII Exhibits) and three volumes of the "Illinois Supreme Court Record" containing the papers reflecting the proceedings on appeal. Supreme Court of Illinois Rule 36; I-III Ill. Sup. Ct. Rec. The Record contains comprehensive evidence about state assessment of railroad property for ad valorem tax purposes in the largest railroad state in the Union, 1933-1963. Also filed with the Clerk of this Court are nine copies of the following appeal documents presented to the Supreme Court of Illinois: the railroads' two volume Abstract of Record, the People's Additional Abstract of the Record, the People's two Briefs and their Petition for Rehearing. A deposition of Raymond S. Danis is certified as part of the Record.

JURISDICTION.

These cases, consolidated for hearing by the Circuit Court of Madison County, Illinois, were brought by the People of the State of Illinois upon the relation of the Madison County Tax Collector to determine whether the People of the State of Illinois or twelve railroad taxpayers are entitled to certain ad valorem taxes which had been charged against the railroads' Madison County properties and paid under protest.[2] The cases developed as tax objection proceedings pursuant to the Illinois Revenue Act of 1939, as amended. Ill. Rev. Stat. ch. 120, §§ 482-824 (1963).[3]

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[2] Madison County is on the Mississippi River near St. Louis, Missouri. The Chicago, Burlington & Quincy (CB&Q), New York Central (NYC) and Chicago and Eastern Illinois (C&EI) contest taxes extended for each of the six years, 1957-1962 (18 cases). The Chicago & Northwestern (C&NW) and Gulf, Mobile & Ohio (GM&O) contest taxes extended for each of the five years, 1958-1962 (10 cases). The Illinois Central (IC) and New York, Chicago & St. Louis (Nickel Plate) contest taxes extended for each of the four years, 1959-1962 (8 cases). The Pennsylvania (Pa.), Wabash (W), Terminal Railroad Assoc. of St. Louis (TRRA), Illinois Terminal (IT) and Alton & Southern (AS) contest taxes extended for each of the two years, 1961-1962 (10 cases). See Appendix B at A-32, 33, 34 *infra*.

[3] Public utility property is generally assessed by local assessors in Illinois but most railroad property is state assessed by the Governor's appointee, the Director of Revenue, who is required by statute to discharge the duties of the Department of Revenue which include equalization of locally assessed property at full value and certification of appropriate multipliers to the 102 counties and prior to 1963, assessment of railroad operating property at full value and distribution of the assessments to the counties of the state. See Appendix D at A. 46-48 *infra*. The office of Director of Revenue and the Department of Revenue were created by the legislature in 1943. They assumed the duties, *inter alia*, of the three member Tax Commission which, also appointed by the Governor, had assessed railroad operating property, 1919-1942. The Director also assesses capital stock and private car line companies. Ill. Rev. Stat. ch. 120, §§ 559, 572, 372.2. (1965). For many years state-assessed taxpayers have had dual access to the state judiciary. First by appeal from the Director's assessment order to any appropriate trial court

The judgments below were entered on June 24, 1965, and the People's Petition for Rehearing was denied on September 27, 1965. Notices of appeal were filed in each of the cases on December 23, 1965. The jurisdiction of the Supreme Court to review these decisions is conferred by 28 U. S. C. § 1257 (2). The following decisions sustain

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with direct appeal thereafter to the Supreme Court. Ill. Rev. Stat. ch. 120, §§ 619, 620 (1961). The parties usually are the railroad and the Department of Revenue and the Department is represented by the Attorney General. Ill. Rev. Stat. ch. 14, § 4 (3) (1961). *E. g., C. & NW v. Dept. of Rev.*, 6 Ill. 2d 278 (1955). Second, by a tax objection proceeding in any county in which the railroad owns property against which taxes have been billed. Any taxpayer may pay part of his annual county tax bill under protest to the County Collector who is the elected County Treasurer, a constitutional officer, serving in an ex-officio capacity pursuant to legislative mandate. Ill. Const. art. X, § 8 (1870); Ill. Rev. Stat. ch. 120, §§ 657, 671 (1961). The People of the State upon the relation of the Collector subsequently apply to a trial court of record in the county for a judgment against the taxpayer's property in the county because of the protested taxes. After due notice the taxpayer may file a "defense," "specifying, in writing, the particular cause of the objection," and the statute provides that the Court hear and determine the matter "in a summary manner, without pleadings and shall pronounce judgment as the right of the case may be. . . ." The statute provides the judgment adverse to the taxpayer shall be in the name of the "People of the State of Illinois." Ill. Rev. Stat. ch. 120, §§ 675, 706, 713, 715, 716 (1965). The parties are the People of the State ex rel. the Treasurer ex-officio the Collector and the taxpayer. The Supreme Court of Illinois has held that the "State of Illinois" is both "the nominal and real and substantial party" adverse to the taxpayer. *People ex rel. Murray v. City of St. Louis*, 297 Ill. 199, 202 (1921). The People and the Collector are usually represented by the chief county legal officer, the State's Attorney, also a constitutional officer. Ill. Rev. Stat. ch. 120, §§ 716, 697; ch. 14, § 5 (1961); Ill. Const. art. VI, § 22, as amended (1870). *E. g., People ex rel. Callahan v. GM&O*, 8 Ill. 2d 66 (1956). The State's Attorney has the same common law powers as the Attorney General has in Illinois as well as statutory powers and has the power to represent the People in matters affected with a public interest. See Note, "The Relationship Between the Attorney General and the State's Attorney in Illinois," U. Ill. L. F. 507 (1949). A tax objection case has been described as "a civil suit or proceeding for the collection of a debt. . . ." *People ex rel. Little v. St. Louis Merchant's Bridge Co.*, 282 Ill. 408, 412 (1918); *Keokuk Bridge Co. v. Salim*, 258 U. S. 122, 124-5 (1922).

the jurisdiction of the Supreme Court to review the judgments on direct appeal in these cases:

A. Judicial action is state action.

Shelley v. Kraemer, 334 U. S. 1, 14 (1947).

B. Conflict between a state constitutional provision as applied and the federal constitution is within the scope of 28 U. S. C. § 1257 (2).

King Mfg. Co. v. City Council, 277 U. S. 100 (1927);
Ry. Express Agency v. Virginia, 282 U. S. 440, 443 (1930);
Torcaso v. Watkins, 367 U. S. 488-9, 496 (1961);
Adamson v. California, 332 U. S. 46, 48 (1947);
Dahnke-Walker Co. v. Bondurant, 257 U. S. 282, 289 (1921);
Fiske v. Kansas, 274 U. S. 380, 385-6 (1927).

C. Fourteenth Amendment protects against arbitrary judicial fact findings.

Minnesota Rate Cases, 230 U. S. 352, 465-66 (1913);
Fiske v. Kansas, 274 U. S. 380, 385-6 (1927);
Schware v. Bd. of Bar Examiners, 353 U. S. 232, 246 (1957);
Washington v. U. S., 357 U. S. 348 (1957) (per curiam);
Thompson v. City of Louisville, 362 U. S. 199 (1960);
Garner v. Louisiana, 368 U. S. 157, 163, 170-1, 173-4 (1961);
Taylor v. Louisiana, 370 U. S. 154 (1962) (per curiam);
Shuttlesworth v. City of Birmingham, 34 U. S. L. Week 4009, 4011 (U. S. November 15, 1965).

D. Fourteenth Amendment protects against discriminatory property taxation.

Cumberland Coal Co. v. Board, 284 U. S. 23-25, 30-1 (1931);

Hillsborough Township v. Cromwell, 326 U. S. 620, 623 (1945);
Walters v. City of St. Louis, 347 U. S. 231, 237 (1954);
L & N Rr. Co. v. Public Service Com. of Tennessee, Civ. No. 4310, M. D. Tenn., Feb. 1, 1966;
County of San Mateo v. So. Pac., 13 Fed. 722 (1882) (D. Cal.) (Field, J., on Circuit) dismissed per stipulation, 116 U. S. 138 (1885).

E. Duty of this Court to analyze facts intermingled with law in order to pass on federal question.

Fiske v. Kansas, 274 U. S. 380, 385-6 (1927);
Napue v. Illinois, 360 U. S. 264, 271-2 (1958);
Northern Pac. Ry. Co. v. North Dakota, 236 U. S. 585, 593 (1914);
Smith v. Illinois Bell Tel. Co., 282 U. S. 133, 149, 162, 164, 169 (1930);
Lindheimer v. Illinois Bell Tel. Co., 292 U. S. 151, 155, 158 (1934).

F. Finality of judgments below.

Carondolet Canal & Nav. Co. v. Louisiana, 233 U. S. 362, 372-3 (1914);
Johnson v. Muelberger, 340 U. S. 581, 583 (1951);
Radio Station WOW v. Johnson, 326 U. S. 120, 123-6 (1945);
Gillespie v. U. S. Steel, 379 U. S. 148, 152, 154 (1964);
Brown Shoe Co. v. U. S., 370 U. S. 294, 305-11 (1962);
People's Gas Co. v. City of Chicago, 309 Ill. 40, 42-3 (1923).

CONSTITUTIONAL PROVISIONS INVOLVED.

"The general assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property such value to

be ascertained by some person or persons, to be elected or appointed in such manner as the general assembly shall direct, and not otherwise. . . ." Ill. Const. art. IX, § 1 (1870).[4]

". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." U. S. Const., amend. XIV, § 1.

STATUTORY PROVISIONS.

Statutory enactments 1945-63 which define certain duties of the Director of Revenue, who is the chief administrative tax official in Illinois, are germane. The more significant provisions are printed as Appendix A at A 46-49 *infra*.

The Johnson Act.

"The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state." 28 U. S. C. § 1341.

QUESTIONS PRESENTED.

1. Whether the uniformity clause in Article IX, Section 1 of the Illinois Constitution as applied by the Supreme Court of Illinois to the facts of these cases is repugnant to the due process clause of the Fourteenth Amendment because the Supreme Court of Illinois arbitrarily and un-

[4] The "uniformity clause" applies only to property taxes. *E. g., Kochesperger v. Drake*, 167 Ill. 122 (1897). "Generally speaking, Illinois is known as having a constitutional limitation which requires the strictest degree of uniformity in the taxation of property." Newhouse, Constitutional Uniformity and Equality in Taxation 125 (1959). ". . . the long tradition of rigid constitutional interpretation and a difficult constitution-amending process explain the persistence of the all-inclusive nature of the property tax in Illinois. . . ." Netzer, Economics of the Property Tax 154 (1966).

fairly has found the value of state-assessed railroad property during the period 1957-1962 by employing huge dollar reductions which are unsupported by any data or rational evidence in the Record or elsewhere, thereby shifting an excessive share of the property tax burden to non-railroad taxpayers.

2. Whether the uniformity clause in Article IX, Section 1 of the Illinois Constitution as applied by the Supreme Court of Illinois to the facts of these cases is repugnant to the equal protection and due process clauses of the Fourteenth Amendment because in finding the value of state-assessed railroad property for the period 1957-1962 the Supreme Court of Illinois arbitrarily, discriminatively and completely disregarded the huge post-World War II increases in the cost of that property resulting from the inflationary movement of the price level and property additions, having previously mandated complete reliance on inflated prices in finding the value of locally-assessed property, thereby shifting an excessive share of the property tax burden to non-railroad taxpayers.

3. Whether the Supreme Court of Illinois has violated the due process clause of the Fourteenth Amendment to the United States Constitution in ordering for railroad taxpayers substantial property tax reductions predicated upon judicial findings of value for state-assessed railroad property during the period 1957-1962 which arbitrarily and unfairly rest on huge dollar reductions which are unsupported by any data or rational evidence in the Record or elsewhere, thereby shifting an excessive portion of the property tax burden to non-railroad taxpayers.

4. Whether the Supreme Court of Illinois has violated the equal protection and due process clauses of the Fourteenth Amendment in ordering for railroad taxpayers substantial property tax reductions predicated upon findings of value of railroad property during the period 1957-1962

which arbitrarily, discriminatively and completely eliminate the influence of huge post-World War II increases in the cost of the property resulting from inflation of the price level and property additions, having previously mandated complete reliance on current prices in finding the value of locally assessed property, thereby shifting an excessive share of the property tax burden to non-railroad taxpayers.

STATEMENT.

In late 1958 twelve railroads filed written objections to the People's application for judgment and sale against their properties in Madison County, Illinois on account of property taxes paid under protest by the railroads for the year 1957, and they filed similar objections each year thereafter through 1963 for the tax years 1958, 1959, 1960, 1961 and 1962. The trial before the Circuit Court of Madison County in 1964 involved all of these objections, and culminated in judgments ordering sizeable refunds to each railroad. The objections asserted that the railroads' taxes were excessive because the Director of Revenue had not increased the assessments of locally assessed property in Madison County to an amount reflecting the full value of such property and at the same time had assessed their Illinois properties in amounts equal to their full values, then distributing an appropriate portion of those assessments to Madison County for inclusion in the County tax books. The Director's pertinent statutory duties are printed as Appendix D at A. 46-49 *infra*. In Madison County and throughout Illinois railroad state-assessed property has comprised about four percent of assessed values. If locally assessed property in Madicon County had been equalized by the Director at full value, rather than at about 50% of value, the railroads remonstrated, the tax rates (which were derived each year by dividing the entire tax base into the tax levies adopted by the various units of local government including the public schools)

would have been significantly lower than the rates actually applied. In short, the railroads claimed their taxes were about twice as high as they should have been because their property was assessed and taxed at its full value.[5]

Nine of the Appellee railroads alleged in their objections that the Director of Revenue had violated the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution by administering his statutory duties in such a manner as to create discriminatory levels of assessment between state-equalized locally assessed property on the one hand and state-assessed railroad property on the other hand. To be precise, the railroads asserted that the Director purposely had not determined the value of locally assessed property accurately and his equalization multipliers certified to Madison County did not increase local assessments to value, while the Director did find value of railroad property correctly and formulated the assessments equal to the value. Of these nine Appellees eight also alleged that the Director of Revenue had violated the uniformity clause

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[5] In the early and mid-1950's two railroads had unsuccessfully asserted that their taxes were too high because their assessments were excessive in violation of the statutory standard of value due to the Director's use of reproduction cost as an element of value. *C&NW v. Dept. of Rev.*, 6 Ill. 2d 278 (1955) (Schaefer, J.), cert. denied 351 U. S. 950 (1956), rehearing denied, 352 U. S. 859 (1956), and *CB&Q v. Dept. of Rev.*, 17 Ill. 2d 376 (1959) (Schaefer, J.). Since 1945, local government expenditures and property tax levies, which in Illinois support only local government and provide most of local government finance, had increased much more rapidly than had assessments. The average property tax rate in Illinois had increased from 2.39 per $100.00 equalized assessed valuation in 1948 to 3.79 in 1960. Report of the Commission on Revenue of the State of Illinois 456 (1963) (data from Property Tax Division of the Department of Revenue); in 1962, the average rate jumped to 4.73. Peo. Ex. 19a; I Exhibits. Assessed valuations in Illinois moved from $20,760,692,207 in 1946 to $23,133,067,629 in 1950 to $27,601,900,590 in 1955 to $34,860,116,397 in 1961, *i. e.*, 67.9% from 1946 to 1961 as property taxes increased during the same period from $416,896,010 to $1,400,303,027. Peo. Ex. 20E, I Exhibits.

of the Illinois Constitution, Art. IX, § 1. All nine, moreover, alleged violations of the due process clause and other provisions of the Illinois Constitution. Three other Appellees, CE&I, Pa. and CB&Q, with one exception, never particularized the legal basis of their defense of discriminatory taxation. The exception was the CB&Q which, with regard to tax year 1959, on January 23, 1961, charged the Director with violating the uniformity clause of the Illinois Constitution. Each objection is in the "Short Records" filed in the Supreme Court of Illinois and here, and are summarized at pp. 4-141 of the railroads' Abstract (Vol. I). I Ill. Sup. Ct. Rec. 17. No other pleadings are provided for in this type of proceeding.

At the trial the railroads introduced data compiled by the Director's staff (Property Tax Division of the Department of Revenue) to prove that the value of locally assessed property in Madison County was generally twice as high as the assessments of this property even after application of the multipliers which had been certified by the Director to Madison County (after 1957, a multiplier of 1). The railroads also introduced evidence to prove that the value of their state-assessed property was equal to the Director's assessments. The People introduced evidence including the Director's own data to prove that the Director's railroad assessments were purposely formulated at less than value in response to constitutional mandates of uniformity which were pertinent because of the Director's failure after 1946 to equalize locally assessed property throughout the state at 100% of value.[5a] Crucial data is condensed in graph form, Appendix F at A 52 *infra*, and by numeral display, Appendix E at A 51 *infra*.

The trial court entered judgments ordering sizeable refunds to each railroad for each year. Appendix B at A. 32-4, 37-44 *infra*. The judgments were predicated upon de-

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[5a] *Del., L. & W. Rr. Co. v. Neeld*, 130 A. 2d 6, 10-1, 14 (1957) (N. J.); see n. 6 at p. 14 *infra*.

terminations of value in each year for each railroad and a determination of value in each year for locally assessed property. The trial court upheld the railroads' contention about the level of assessment of locally assessed property in Madison County, relying on sales study data based on inflated price levels, to determine value, and relating the assessments to value found the levels of assessment in Madison County for 1957-1962 ranged from 48.14% to 50% of value. The court's findings of value for each railroad's state-assessed property were based on data placed on "assessment data sheets" by the Director's staff from information supplied by the railroads in annual returns, and obtained from the Bureau of Valuation of the Interstate Commerce Commission which had been compiled pursuant to Section 19a as amended of the Interstate Commerce Act, 49 U. S. C., § 19a. The Director's staff had determined system figures for capitalized income, stock and debt and reproduction cost less depreciation and obsolescence and allocated them into Illinois explicitly reducing the ICC cost figure before averaging the elements of value. Most specifically, the trial court found railroad values by employing a valuation formula as it had been essentially applied during the 1940's and again in 1963 by the Director, averaging the three elements of value traditionally utilized in Illinois: capitalized earnings, stock and debt value and reproduction cost less depreciation and obsolescence. Relating the judicially determined statewide values of each Appellee's property to the Director's respective statewide assessments for each railroad for each year, the trial court derived levels of assessment. In its value determinations for Appellees' properties the trial court did not employ certain huge reductions from the average of the three traditional elements of value used by the administrator in formulating the assessments. These so-called "judgment factor" reductions had grown to huge dimensions during the 1950's as railroad assessments remained level despite

sustained inflation after World War II. See Appendix F at A. 52 *infra.* In 1963, subsequent to newly enacted legislation requiring the Director to equalize railroad assessments with locally assessed property, the Director had likewise discarded these "judgment factor" reductions and found railroad values to equal the averages of the three traditional elements of value. Appendix B at A. 29 *infra.* The trial court's findings of value led to determinations that the levels of assessment for Appellees' state-assessed property ranged from 58-85% of value, 1957-62. See Appendix B at A. 32-34 *infra.* The effect of these findings was to decrease substantially the amount of refunds which 100% levels of assessment would have required. Having determined that the difference in the levels of assessment warranted relief for the railroads, the trial court ordered that the refunds be computed according to the mandate of **People ex rel. Hillison v. CB&Q, 22 Ill. 2d 88, 96-99 (1961)** *i. e.*, determine what the taxes of the railroads would have been if all property in Madison County had been assessed at its full value and subtract those amounts from the taxes actually billed, the remainders constituting the refund amounts. Appendix B at A. 37-45 *infra.*

The trial court's opinion with regard to valuation of railroad property emerged from the conclusion that the economic theory, explained in the Record, underlying the Illinois valuation formula as developed and refined by highly qualified economists 1933-1949 who were in the employ of the State of Illinois, was sound, and that the "judgment factor" reductions from the formulaic averages were arbitrary items used by the administrator to eliminate inflation since World War II for the purpose of complying with constitutional duties of uniformity. The trial court rejected argument that the "judgment factors" were elements of value. To use the "judgment factor" reductions as elements of value for purposes of the

property tax would be arbitrary and discriminatory, particularly in view of prior Supreme Court of Illinois precedents requiring exclusive reliance on the inflated price level in finding the value of locally assessed property. See Appendix B at A. 28-30 *infra*. Following the example of the Supreme Court of Illinois in four prior decisions 1961-64, the trial court verbalized the basis of relief as "constructive fraud."[6]

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[6] On limited Records involving one railroad for one or several tax years the Supreme Court of Illinois had granted relief in four cases arising in other counties. In these cases the Court's articulated rationale was "constructive fraud," a doctrine which had developed in Illinois jurisprudence over many decades to preclude, not to justify, judicial interference with administration of the property tax. People's Second Brief in the court below contains a survey of the pertinent Illinois law, 1859-1959. II Ill. Sup. Ct. Rec. 88. Thus in *People ex rel. Hillison v. CB&Q*, 22 Ill. 2d 88 (1961) (tax year 1958); *People ex rel. Kohorst v. GM&O*, 22 Ill. 2d 104 (1961) (tax year 1957); *People ex rel. Wenzel v. C&NW*, 28 Ill. 2d 205 (1963) (tax years 1956-59) (railroad valuation not at issue); and *People ex rel. Enrietta v. GM&O*, 29 Ill. 2d 605 (1964) (tax year 1959), the Supreme Court of Illinois did not discuss the constitutional nature of the litigation or acknowledge that it was determining values. Rather the court erroneously premised that it was directly reviewing railroad assessments. The effect of the oversight was compounded when in purporting to review railroad assessments, the Court overlooked the presumption of compliance by the Director with constitutional mandates arising from the railroads' contemporaneous proof that locally assessed property had been equalized by him at far less than the statutory standard of full value. The Director has always been under a constitutional duty to debase railroad assessments if locally assessed property assessments were equalized at less than full value—even if to do so he must violate a statute. *People ex rel. v. I. C. Rr. Co.*, 355 Ill. 601, 606 (1934); *Bistor v. McDonough*, 348 Ill. 624, 632 (1932); *People ex rel. v. CB&Q*, 300 Ill. 399, 404 (1921); *People ex rel. v. I. C. Rr. Co.*, 273 Ill. 220, 244-49 (1916); *Law v. People ex rel.*, 87 Ill. 385, 405-06 (1877); *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441, 446 (1923). In fact, until 1946 the Director, and the Tax Commission before him had violated the statute which since 1927 had required full value assessments of railroad property by explicitly equalizing railroad assessments. See *e. g.*, Hodes, "The Assessment of Railroads in Illinois, 29 Ill. L. Rev. 744, 759 (1935); Note, "Constitutionality of State Equalization of Property Assessments in Il inois," 17 *U. of Chi. L.* Rev. 93 (1949); Note, "Equalization of Railroad Assessments in Illinois," 35 *Ill. L. Rev.* 766 (1941).

The People did not appeal the trial court's judgments. The method for finding the value of locally assessed property had been not only clearly mandated during 1961-4 by the Supreme Court of Illinois in **Hillison, Kohorst, Wenzel** and **Enrietta** based on records which were ample on the question but also the method was soundly grounded in the evidence and economic theory as the present record discloses. The trial court's findings of value for railroad property were also soundly grounded in data and in economic theory as the record discloses.

The railroads appealed the judgments because of the value findings of their property and asserted in their Notices of Appeal that the trial court's judgments, to the extent that they rested on the value findings of railroad property, violated the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution as well as the uniformity clause of the Illinois Constitution and several other state constitutional provisions. Vol. I, Rr. Abstract 151, I Ill. Sup. Ct. Rec. 17. The railroads' grievance was that in finding values the trial court had not utilized "judgment factor" reductions from the formulaic averages for 1957-1962. See Appendix E at A. 51 *infra*. Defending the trial court's judgments in the Supreme Court of Illinois, as they had defended the Director of Revenue in the trial court, in an effort to collect the public revenue due, the People responded to two Briefs filed by the railroads. The railroads' principal brief at p. 16 reasserted that the trial court's judgments violated the equal protection and due process clauses of the Fourteenth Amendment and also the due process and uniformity clauses of the Illinois Constitution, with quotation from the uniformity clause of the State Constitution set forth on p. 6. I Ill. Sup. Ct. Rec. 22.

The People's two Briefs argued that the trial court had correctly applied state and federal constitutional require-

ments of uniformity, specifically mentioning both the Fourteenth Amendment and the uniformity clause of the Illinois Constitution. The People argued that utilization of the "judgment factor" reductions by the judiciary would violate the due process and equal protection clauses of the Fourteenth Amendment, and, if based upon the uniformity clause of the Illinois Constitution, would enforce that clause in a manner repugnant to the equal protection and due process clauses of the Fourteenth Amendment. People's Brief at pp. 9, 11, 74, 75, 77, 81, 87, 90; II Ill. Sup. Ct. Rec. 72. The People argued that there was no data in the record or elsewhere to support the "judgment factor" reductions and that use of them by the Judiciary as elements of value would constitute arbitrary constitutional fact finding. Moreover, the People argued that their use as elements of value would be discriminatory because the effect of the "judgment factors" in the judicial valuation process would be to arbitrarily eliminate the influence of inflation. Employment of the "judgment factors" would result in the elimination of the inflating influence in the formulaic averages of increases due to price rises and also net property acquisitions, which increases were coincidentally so great that their elimination would destroy the influence of the cost factor used in the Illinois formula for finding value. See People's Second Brief 59-60, 46-53, II Ill. Sup. Ct. Rec. 88. There would thus exude a fundamental unfairness because the value of state-assessed railroad property would be, in this manner determined for the purpose of enforcing uniformity mandates for the property tax and the value of locally assessed property, the Supreme Court of Illinois had held, must be based on sharply and steeply inflated prices. Moreover, use of the "judgment factor" as an element of value in some cases would produce value substantially less than the average of the capitalized income and stock and debt factors. The railroads filed a Reply Brief which quoted some cases based upon

state and Federal constitutional mandates. Rr. Reply Brief at pp. 44-45, II Ill. Sup. Ct. Rec. 84. With leave of Court the People filed a second brief in response to the Reply Brief which had been filed after oral argument. The People referred to the constitutional provisions pertinent to arbitrary and discriminatory taxation and argued that the trial court would have violated pertinent constitutional provisions if it had adopted the railroads' arguments. Peo. Second Brief at pp. 2, 4, 5, 20-30, 39, 16-B, 17-B, II Ill. Sup. Ct. Rec. 88. In its decision the Supreme Court of Illinois reversed and utilized the "judgment factor" reductions as elements of value and determined the values of Appellees' property by reducing the factually-based averages accordingly. The industry values thus implied for 1957-1962 were lower than the industry valuations in 1946 except that for 1957 the industry valuation was 1.2% higher than the 1946 valuation. The Court ordered refunds based upon 100% levels of assessment for Appellees' property. The opinion did not define or discuss the constitutional questions, and it described the People as criticizing the Directors for failure to assess railroad property at its full value, although the People in fact had been defending the Director's actions as a commendable discharge of constitutional duty. Basing its decision on "constructive fraud," the Court issued an opinion which contained important statements unsupported by the Record.[7]

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[7] For example, proceeding from the premise that it was reviewing assessments and overlooking the indubitability that it was finding values, the Court stated that the Director certified railroad assessments to the county as full value assessments. The certifications are in the Record and they state nothing about value. Compare Appendix A at A-13 *infra*, with pp 12-15 of Vol. II of the Railroads' Abstract and with People's Second Brief at p. 53 and with p. 15 of the People's Petition for Rehearing. I Ill. Sup. Ct. Rec. 18; II Ill. Sup. Ct. Rec. 88, 219. Indeed the Director's annual publication notices were ambiguous and the director had never used the statutory words, "fair cash value," as he did in Dec. 1963 as the Record reveals. The opinion stated that People's expert witness, economist and property tax expert Leo Cohen, did not testify that railroad assessments were less than full value. Yet that opinion

Knowing that the Record contained background information in detail never before presented to the Court, and having invited the Court's attention to the true issues of state and federal constitutional import, the People were surprised by the Court's decision and articulations. Therefore the People filed a lengthy Petition for Rehearing which set forth in detail the position that the Supreme Court's judgments were arbitrary and discriminatory and had applied the uniformity clause of the Illinois Constitution repugnantly to the due process and equal protection clauses of the Federal Constitution and had violated rights guaranteed to the People by the due process and equal protection clauses of the Fourteenth Amendment. Peo. Pet. for Rehearing, at pp. 5, 7, 9, 42, 43, 28-35; I Ill. Sup. Ct. Rec. 219. The Supreme Court denied the Petition without elaboration. III Ill. Sup. Ct. Rec. 220. **New York ex rel. Bryant v. Zimmerman, 278 U. S. 63, 67 (1928); Braniff Airways v. Nebraska State Board, 347 U. S. 590, 598-9 (1954); Brinkerhoff-Faris Trust Co. v. Hill, 281 U. S. 673, 677-8 (1930); Great Northern Rr. Co. v. Sunburst Oil Co., 287 U. S. 358, 366-7 (1932); cf. Alaska v. American Can Co., 358 U. S. 224 (1959).**

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was explicitly stated by Professor Cohen. Compare Appendix A at A-89 *infra*, with R. 1576-82 of Vol. III. Test.; Appendix B at A-29 *infra*, and the People's Additional Abstract at p. 97, II Ill. Sup. Ct. Rec. 76, and People's Petition for Rehearing at p. 13, II Ill. Sup. Ct. Rec. 219. The opinion overlooked that Raymond F. Danis, the Director's staff chief for railroad assessments, 1949-1960, never testified that the purpose of the "judgment factor" was to eliminate the influence of price level increases or to eliminate cost as an element of value. Cf. Appendix A at A-11. The changing nature of his obscure and inconsistent rationalizations of the "judgment factor" in five Records to reach the Supreme Court of Illinois after 1954 is traced in Appendix E to People's Brief in the Court below. II Ill. Sup. Ct. Rec. 72. Moreover, no one in the cases at bar testified about the value of nine of the twelve Appellees except Mr. Broley Travis of California, a retired administrator turned consultant, who was not familiar with them and simply eliminated cost in looking at Rr. Ex. 77 which brought together in three trend lines all of the data for all twelve railroads. People's Pet. for Rehearing 14-15, II Ill. Sup. Ct. Rec. 219.

THE QUESTIONS ARE SUBSTANTIAL.

The judgments below are perforce based on constitutional grounds although the opinion below, while referring to discrimination, does not define or discuss the precise constitutional provision(s) applied. The state action challenged is action which interferes with the administration of the property tax by the administrative official duly appointed by the Governor pursuant to duly enacted legislation based upon Art. IX, § 1 of the Illinois Constitution. See pp. 6-7 *supra*. If in writing of discrimination the Court below was indicating that its decision was based upon the uniformity clause of Art. IX, § 1 of the Illinois Constitution,[8] it is clear that this Court's appeal jurisdiction is involved. "Statute" in 28 U. S. C. § 1257 (2) has long been interpreted to include constitutional provisions and there is no reason why applications of such provisions valid on their face are any less within the scope of § 1257 (2) than applications of legislative enactments valid on their face. See the pertinent cases cited at p. 5 *supra*.

There may be no need for clarification of the basis of the decision below as logical analysis of the questions presented suggests. There are two key strands which run through the four questions presented. First, use of the "judgment factor" reductions without adequate evidentiary support as elements of value for railroad property, which reductions eliminate the influence of inflation and property additions, was arbitrary and fundamentally unfair, in violation of the due process clause of the Fourteenth Amendment. Second, use of the "judgment factor"

[8] A suggestion of the basis of the Court's opinion below was made six years before the decision below. In *CB&Q v. Department of Rev.*, 17 Ill. 2d 376, 390 (1959), the Court stated that the railroad may be "bearing a disproportionate share of its tax burden in violation of the constitutional requirement of uniformity, Article IX, Sec. 1, Const. of 1870. . . ."

reductions as elements of value for railroad property was arbitrarily discriminatory, in violation of the equal protection clause of the Fourteenth Amendment. With regard to the first strand, if the basis of decision is an application of the state uniformity clause, this Court's appeal jurisdiction is involved; if the basis is an application of the due process and equal protection clauses of the Fourteenth Amendment, or either, then this Court's certiorari jurisdiction is involved. If the basis is both state and federal provisions, then both appeal and certiorari jurisdiction are involved. If this Court believes that the strand of arbitrary and unfair usage of the "judgment factor" reductions and the strand of arbitrary discrimination resulting from its usage merit an exercise of certiorari jurisdiction there is, we submit, no need of clarification of the basis of the decision below. The explanation is that the first strand, *i. e.*, arbitrary value finding which is unfair and based on inadequate evidentiary support, does not require clarification because the constitutional provision applied is immaterial. The second strand, *i. e.*, arbitrary discrimination, does not require clarification because whether or not the decision is based on a state constitutional provision the strand requires an interpretation of the equal protection clause of the Fourteenth Amendment; that is, if the decision rests on the application of a state constitutional provision the application must be measured against the limitations of the equal protection clause, which are pertinent anyway if the decision is based only on the equal protection clause. In the event that this Court believes that one or both of the two strands does not merit an exercise of certiorari jurisdiction and the same strand(s) presents a substantial question(s), and if this Court concludes that clarification is required in order to determine whether appeal jurisdiction is pertinent, we submit with deference that the Court note probable jurisdiction and continue the cases pending

clarification or vacate the judgments below and remand the cases for clarification. **Minnesota v. National Tea Co., 309 U. S. 551, 555-7 (1940); Mental Hygiene Dept. v. Kirchner, 380 U. S. 194, 196 (1965); State Tax Com. v. Murray Co., 364 U. S. 289 (1960); Jennings v. Illinois, 342 U. S. 104 (1951); Chicago v. Willett Co., 341 U. S. 913 (1951)** (*per curiam*). See Note, "Supreme Court Treatment of State Court Cases Exhibiting Ambiguous Grounds of Decision," 62 Col. L. Rev. 822, 835, n. 90, 847, n. 165 (1962).

1. The Financial Impact on Locally Assessed Taxpayers and State and Local Government Is Pervasively Important.

The financial consequences of the Supreme Court's judgments below are incalculably serious. They are of public as well as private nature. The judgments approximately double the amount of the shift of the property tax burden from the railroads of Illinois to the rest of the property taxpayers which had been ordered by the trial court. As of 1960, Illinois ranked fourth in population, with a population of 10,081,000. Illinois ranks first in number of railroads: 69 in 1960. Chicago ranks as the country's greatest rail center served by twenty trunk lines, handling 34,000 freight cars daily. The World Almanac 222 (1965). Every railroad in the state which has tax objections pending for 1957-1962 will now receive in refunds generally about 50% of their total tax bills instead of generally 25% as required by the trial court's findings.[9] Every property taxpayer in Illinois owning

[9] Because judicially found levels of assessment of state-assessed property are involved the whole State is involved. As of February 19, 1966, the People's agent in Madison County, Mr. George Musso, County Collector, is holding $2,043,501.75 of tax monies protested by the railroads, 1957-1962. $3,070,800 had been protested but settlement of some objections reduced the figure. Madison County has the third largest railroad assessment in Illinois, Cook County ranking first, with about 40% of the total railroad assessment. The pending protested tax monies in Cook County approximate $39,661,030.79 as of January 15, 1966. Letter from

property in a tax district which contains railroad property will have to pay a higher tax bill to make up for the increase in refunds ordered by the Court below.[10] In the future as local governmental expenditures including school costs increase and tax rates and property tax burdens increase, the share borne by the railroads will be relatively less and the share of the rest of the tax-paying public relatively more.[11] The court below in interpreting the pertinent constitutional provisions has placed the administrator under mandate to eliminate the influence of inflation in railroad valuations even though in Illinois since 1963 the Director is under statutory duty to equalize railroad assessments with locally assessed property. To the extent that the property tax burdens are affected by an

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Bernard Korzen, Cook County Collector, to George Musso, Madison County Collector, January 21, 1966. In about 31 states most railroad property is state-assessed and in 1961 about 17% of the state assessments of railroad property in the United States. (5.9 billion) was in Illinois. U. S. Bureau of the Census, Census of Governments: 1962, Vol. II, Taxable Property Values 2.

[10] In 1963 there was railroad property in every one of Illinois' 102 counties constituting from .6% to 16.9% of total county assessments. Illinois Property Tax Statistics 99 (Department of Revenue 1963). The proportion of railroad property within particular districts may vary widely.

[11] See pp. 39-41 *infra*. In 1963, total property taxes extended in Illinois were up $48,609,279 over 1962, or 3.3%, with Downstate Illinois experiencing a 6.1% increase. Illinois Property Tax Statistics 103 (Dept. of Rev. 1963). Property taxes in Illinois increased from $382,269,264 in 1945 to $1,521,423,980 in 1963. *Id.* at 101. Local government spending in the United States has increased from nine billion in 1946 to fifty billion in 1965 and by 1970 the figure is estimated at 100 billion. "The Great Urban Tax Tangle," Fortune 106, March, 1965. In 1963, 88% of local tax revenue was provided by property taxes. Maxwell, Financing State and Local Governments 127 (1965). The rate of expenditure increase is faster than for federal spending, for the increase in local spending was 47% from 1958-1965. During 1958-65 property taxes in the United States increased from $12,385,000,000 to $18,414,000,000. U. S. Bureau of Census, Census of Governments 1962, Vol. VI, No. 4 Historical Statistics on Government Finances and Employment 44-46.

excessive shift of millions of dollars from the tax bills of the great railroads to the tax bills of individual taxpayers the interest of the State and of local government is affected. The property tax voters will be less willing to vote for essential governmental action or for public officials who desire to bring about such action because of the already onerous property tax burden further enlarged by arbitrarily discriminatory valuation findings of the judiciary. Uniformity is essential to the viability of the property tax and in that sense judicial action violative of constitutional mandates will tend to weaken the financial strength and viability of local government in the United States.

According to the American Association of Railroads property taxes in Illinois were excessive by $18,928,688 for 1957 because of unconstitutional state administrative action. The Court below has arbitrarily found values to support the claim. The trial court found values which prove the claim grossly exaggerated. According to the AAR, for 1957, nationwide discriminatory property taxes cost the railroads $141,187,829. Sen. Rep. No. 445, 87th Cong., 1st Sess. 487 (1961). The figure is based on the false premise that in all full value states, of which there are 39, state assessments of railroad property, if made, have been equal to full value. See pp. 29-37 *infra*. **I The Role of the States in Strengthening the Property Tax 43** (Advisory Commission on Intergovernmental Relations 1963). See Pierce, "The Case Against Discriminatory State Assessment of Railroad Property for General Property Tax Purposes," 70 Public Utilities Fortnightly No. 7, 434, 439 (1962). The financial stake in these cases is astronomical and in the next 20 years, with increasing tax burdens, not including more inflation, may approach one billion dollars. See pp. 39-41 *infra*.

2. The Arbitrary Judicial Value Findings Below Conflict With Due Process Standards of Judicial Action as Defined by This Court.

Enforcement of uniformity mandates contained in state and federal constitutions in state ad valorem tax cases, gaining momentum in the last six years, particularly in railroad cases,[12] perforce imposes on the judiciary the duty of making determinations of value. The state action here challenged is judicial action and it relies on huge arbitrary "judgment factor" reductions in finding value of property owned by multi-state corporations in an industry which because of federal regulation since 1887 permits value analysis with an amplitude of data and statistics.[13] The state action here challenged violates due process standards developed and applied in **Minnesota Rate Cases, 230 U. S. 352, 465-66 (1913); Schware v. Bd. of Bar Examiners, 353 U. S. 232, 246 (1957); Washington v. U. S., 357 U. S. 348 (1957) (per curiam); Taylor v. Louisiana, 370 U. S. 154 (1962) (per curiam); Garner v. Louisiana, 368 U. S. 157, 163, 170-4 (1961); Shuttlesworth v. City of Birmingham, 34 U. S. L. Week 4009, 4011 (U. S. November 15, 1965).**

The use of the "judgment factor" deflationary reductions as elements of value by the Court below poses questions which technical knowledge proves is of great substantiality. The coloration of the questions is affected by considering that not only were these "judgment fac-

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[12] See note 18 at pp. 29-30 *infra*.

[13] The original cost and reproduction cost data of the Interstate Commerce Commission's staff are in the Record. ICC has prescribed uniform accounting procedures which are in the Record. On April 17, 1963, the ICC amended its Uniform System of Accounts to provide that there be agreement between carrier books and ICC original cost records. 28 F. R. 4302 (1963). Detailed statistics on operations are regularly published by the ICC's Bureau of Transport Economics and Statistics under the name of "Transport Statistics."

tors'' unsupported by data and rational evidence but also the Supreme Court of Illinois utilized them to interfere with the integrity of a sound valuation formula which had been developed in Illinois by trained economists over a long period of time.[14] The substantiality of the questions posed by the arbitrary usage is increased by considering that in the context of the property tax, the Supreme Court below used the ''judgment factors'' to find value of railroad property to enforce constitutional mandates of uniformity when the effect of using them is to eliminate completely the influence of inflation and vast capital improvements since World War II at the same time that the Court below mandated value for other property based exclusively on inflated prices.[15] The substantiality is enhanced also

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[14] Mr. Simeon Leland, author, educator and now Dean of the School of Liberal Arts at Northwestern University; Mr. George W. Mitchell, author, now Member of the Board of Governors, Federal Reserve System, and of the National Committee on Government Finance, appointed by the Brookings Institution, and Lynn A. Stiles, author, now Senior Economist, Federal Reserve Bank of Chicago. Recent decisions reveal that the formula or a comparable facsimile has been and is in use throughout the United States as tax administrators have striven to articulate the valuation process. See Adams, *"Valuation of Railroad Property for Taxation,"* 23 J. Pol. Econ. 12 (1915); See cases cited in n. 18 at pp. 29-30 *infra. E. g., St. Louis-SF Ry. Co. v. Arkansas Public Service Commission,* 304 S. W. 2d 297 (1957) (Ark.); *CB&Q v. State Board,* 101 N. W. 2d 856 (1960) (Neb.). The Nebraska formula appears to be based on judicial value finding. *Chicago, R. I. Rr. v. State,* 197 N. W. 114, 119 (1923) (Neb.) In 1938 the Section of Research of the Federal Coordinator of Transportation under the Emergency Rai road Transportation Act of 1933 objectively reported that each of the alternative elements of value is subject to serious criticisms and that most state administrators use a composite of the elements of value for valuing railroad property. Vol. II, Part II, Public Aids to Transportation 200. See n. 27 at p. 37 *infra.* Why the Illinois formula is sound is explained in the Record by People's witness, Leo Cohen, an economist, educator, and property tax expert. See Appendix B at A-29-30 *infra.*

[15] Analysis of the cost data reveals that the equipment accounts of the railroads have substantially increased since World War II as the fleets were dieselized and facilities improved. Using ICC figures the American Association of Railroads in 1962 reported

by considering that the inflation suppressed by the "judgment factors" is so great that coincidentally by figuring backwards from the assessment one can mathematically demonstrate that the influence of cost in valuation was eliminated by the Supreme Court of Illinois.[16] That is, values found are not significantly higher and in some cases are less than the average of capitalized income and securities values. See Appendix F *infra*. Finally, accounting and other specialized knowledge indicate that the usage of the arbitrary "judgment factors," coincidentally tying the valuations to capitalized income and securities data, requires plenary consideration by the Court of the questions presented.[17]

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that the book value of investment in road and equipment increased from $27,277,974,000 in 1946 to $35,541,973,000 in 1961. *Railroad Transportation, A Statistical Record* 1921-1961, p. 3 (1962). See People's Ex. 72, IV Exhibits. Capital expenditures for new equipment, improvements to equipment and operating property exceeded $100,000,000 each for the CB&Q, the C&NW and the I. C., 1960-64. "The Proposed Rock Island Merger" an undated pamphlet recently distributed among securities specialists by the Board Chairman of the C&NW. The C&NW in Illinois after 1956 completely modernized its suburban equipment and facilities at a cost estimated by a company official of over $40,000,000 and has acquired by consolidation and merger other railroad properties during 1957-1962. See People's Brief, Appendix F, II Ill. Sup. Ct. Rec. 88.

[16] One of the objectives of the unit valuation of railroads was to subject to taxation intangible values deriving from the working agglomeration of physical assets peculiar to railroad operations. These intangibles were intended to increase the value of the railroad over the value of the physical assets. Isaacs, "The Unit Rule," 35 Yale L. J. 838, 843 (1926).

[17] The income figures capitalized are "net railway operating income," an ICC accounting concept, which clearly needs accounting adjustments which, if made, would increase the base figure to be capitalized and the Court below did not require or apparently consider these adjustments. See Appraisal of Railroad and Other Public Utility Property for Ad Valorem Tax Purposes 23-30 (1953) (A Report of the Committee on Unit Valuation of the National Association of Tax Administrators (NATA); People's Brief, at Appendix M, II Ill. Sup. Ct. Rec. 88. Moreover the amount to be capitalized, aside from the accounting adjustments just mentioned, are distorted on the low side due to the peculiari-

In **Minnesota Rate Cases** at 465-66 this Court wrote:

"The wide range of the estimates . . . shows the difficulty and the lack of certainty in passing judg-

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ties of railroad accounting. A large part of railroad expenditure for property is accounted for on a replacement rather than on a depreciation basis, *i. e.*, significant items of property purchased are charged to expenses rather than to capital accounts, contrary to accounting practices followed in other industries, directly deflating income during inflation periods and periods of increased maintenance expenditure. If these expenditures had been capitalized and depreciated instead of being charged to expenses, income would have been much higher. ICC Study 424 in 1949 proposed that the railroads change to depreciation accounting and the railroads resisted. The practice has been condemned by a Committee of the American Institute of Accountants. It is estimated that replacement accounting as of 1946 had caused an understatement of original cost of the industry's property by $868,000,000, and for 1917-1947, net railroad operating income was understated $14,000,000 a year or if capitalized at 6%, $233,000,000 a year. House Report No. 1167, Union Calendar No. 452, 85th Cong., 1st Sess., 6-13 (1957) ("Railroad Accounting Procedures," Twelfth Report by the Committee on Government Operations). During the period 1957-1962 there are other specialized factors which served to deflate net railroad operating income. In 1951, the ICC permitted the railroads to charge off rapid amortization of facilities constructed during the "emergency" of the Korean War over five years instead of over estimated lives, but the ICC did not permit the railroads to set up reserves for federal income taxes thus saved from the acceleration. 284 ICC 9. During 1957-1962 many amortization periods expired and federal income taxes increased disproportionately as the CB&Q's Annual Reports in the Record explain. See House Report No. 1167 *supra* at 13-25. Also, during 1957-62, even though per diem rental charges increased, management decided for reasons of economy or necessity to rent more equipment rather than own it, thus vastly increasing car rental expense. Hearings, Freight Car Shortage, Subcommittee of the Committee on Commerce, U. S. Senate, 87th Cong., 1st Sess. 88 (1961). For example, the debit balance of Net Rents (a charge against income) for the C&NW grew from 7.9 million in 1956 to 14.1 million in 1963. See Appendix F, Sheet 1-D, People's Second Brief, II Ill. Sup. Ct. Rec. 88. One of the basic defects of the stock and debt element of value is that many railroads are subject to interlocking control with securities or controlling securities closely held, impeding accurate reflection of true value. For example, during all or most of 1957-1962 the CB&Q, the TRRA and the A. S. were controlled by other railroads or industry, with a very small percentage of stock in the hands of the public. The C&NW during all or part of the period 1957-1962 was the largest single stockholder of the GM&O.

ment. We are of the opinion that on an issue of this character involving the constitutional validity of state action, general estimates of the sort here submitted, with respect to a subject so intricate and important, should not be accepted as adequate proof to sustain a finding of confiscation . . . It may be said that this would have been a very difficult matter but the company having assailed the constitutionality of the State Acts and orders was bound to establish its case, and it was not entitled to rest on expressions of judgment when it had in its power to present accurate data which would permit the Court to draw the right conclusion."

Mr. Justice Brandeis has written "Judicial judgment ought not to be invoked where facts cannot be adequately explored and resolved," and in criticizing **Smyth v. Ames**, in a rate making case, the Justice wrote, "For the rule not only fails to furnish any applicable standard of judgment, but directs consideration of so many elements, **that almost any result may be justified." S. W. Bell Tel. Co. v. Pub. Serv. Com., 202 U. S. 276, 289, 297-8 (1923)** (dissenting opinion) (emphasis added). These principles are violated by arbitrary judicial use of the "judgment factor."

The fact that the railroad assessments in Illinois have not significantly changed from 1946 to 1962 indicates that state judicial action which finds them to be equal to value —particularly in the context of a rationally designed articulated formula—renders apposite the observation of Mr. Justice Hughes, quoting Mr. Justice Brewer, in **Minnesota Rate Cases** *supra*, at p. 460: " 'Such a result indicates that there is something wrong with the process by which the conclusion is reached . . .' "

3. Arbitrary Use by State Judiciaries of Administrative Deflationary "Judgment Factors" in Constitutional Value Finding Impends Throughout the United States as the Railroads Seek to Obtain Judicial Relief From Property Tax Burdens and at the Same Time a Judicially Created Property Tax Preference for Themselves.

Arbitrary interference with data truly reflecting value by use of "judgment factor" reductions in state assessments of railroad property where the state administrators do not have statutory authority to equalize them—as is the case in most full value states—is not peculiar to Illinois. Its existence in other states of the Union on the state administrative level is being brought to light as the railroads move the judiciary to reduce their property taxes either by review of their assessments, which is based on statutory grounds, or by enforcement of constitutional mandates of uniformity.[18] The Record now before the

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[18] Direct judicial review of administrative assessments have to date failed to obtain judicial elimination of inflation, *i. e.*, reproduction cost or original cost, as an element of value. The issue is does assessment exceed value and the "judgment factors" are not at issue because they are reductions. The opinions in many of these cases are revealing. *C&NW v. Dept. of Revenue*, 6 Ill. 2d 278 (1955) (Schaefer, J.) ("judgment factor" unexplained) *cert. denied* 351 U. S. 950 (1956), *rehearing denied*, 352 U. S. 859 (1956); St. *Louis-S. F. Rr. Co. v. Ark. Public Service Com.*, 304 S. W. 2d 297 (1957) (Ark.); *CB&Q v. Dept. of Rev.*, 17 Ill. 2d 376 (1959) (Schaefer, J.) ("judgment factor" unexplained); *Florida East Coast Rr. Co. v. Assessment Bd., et al.*, 178 S. 2d 355-357 (1965) (Fla.) ("judgment factor" unexplained); *CB&Q v. State Bd.*, 400 P. 2d 494 (1965) (Wyo.) (semble). The railroads have achieved more success in constitutional cases involving state uniformity clause provisions and the equal protection clause of the Fourteenth Amendment in which cases the issue is what is the relation of value to assessment and the "judgment factor" is at issue. *Kansas City So. Ry. Co. v. Board*, 331 P. 2d 899 (1958) (Kan.) (on pleadings); *Kansas City So. Rr. Co. v. Ark. Pub. Service Com.*, 323 S. W. 2d 193 (1959) (on pleadings); *CB&Q v. State Board*, 101 N. W. 2d 856, 862-4, 871 (1960) (Neb.) (arbitrary and unexplained reduction factor); *C&NW v. State Board*, 101 N. W. 2d 873-881

Court, coming up from the premier railroad state, and other sources of information, strongly indicate that state tax administrators have since the onset of inflation in the late 1940's employed arbitrary "judgment factor" reductions or similar arbitrary techniques in central assessments of railroad property in order to suppress inflation in railroad assessments. This arbitrary interference with the valuation process as applied to railroad property on the administrative level developed for the purpose of holding railroad assessments level or reducing them. The action was required because the tax administrators, sensitive to uniformity duty, were aware that after World War II the level of assessment of locally assessed property was dropping as inflation raised values of locally assessed property faster than local assessments were increased by local and state administrative officials, thus causing a retreat of the level of assessment. The need for administrative suppression of inflation in railroad assessments emerged from an unprecedented combination of circumstances: *i. e.*, (a) the onset of sustained inflation in the mid 1940's; (b) the use of reproduction cost (or variant thereof) in ad-

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(1960) (Neb.) (arbitrary and unexplained reduction factor); *U. Pac. v. State Board*, 101 N. W. 2d 892, 899 (1960) (Neb.) (arbitrary and unexplained reduction factor); *People ex rel. Hillison v. CB&Q*, 22 Ill. 2d 88 (1961) ("judgment factor"); *People ex rel. Kohorst v. GM&O*, 22 Ill. 2d 104 (1961) ("judgment factor"); *C. M. St. P. & Pac. v. Gillis*, 118 N. W. 2d 313, 315-6 (1962) (S. D.) (reducing percentage of cost factor weighted); *C&NW v. Gillis*, 118 N. W. 2d 316 (1962) (*per curiam*) (S. D.); *So. Pac. v. Cochise County*, 377 P. 2d 770 (1963) (Ariz.) (on pleadings); *People ex rel. Wenzel v. S&NW*, 28 Ill. 2d 205 (1963) ("judgment factor"); *People ex rel. Enrietta v. GM&O*, 29 Ill. 2d 605 (1964) ("judgment factor"); *C&NW v. State Tax Com.*, 137 N. W. 2d 246 (1965) (Iowa) ("judgment factor" unexplained) (another case now pending in Iowa trial court); *Florida East Coast Rr. Co. v. Green*, 178 So. 2d 355, 358 (1965) (Fla.) ("judgment factor"); *L. & N. Ry. Co. v. Public Service Com. of Tennessee*, Civ. No. 4310, M. D. Tenn., Feb. 1, 1966 (on pleadings; "judgment factor" acknowledged but unexplained) (See Appendix G at A-57-8 *infra*); *L. & N. Ry. Co. v. State*, Civ. No. 36367, 15th Judicial District, Montgomery County, Alabama (pending).

ministrative valuation which element of value reflects inflation;[19] (c) historic and traditional "underassessment," (*i. e.*, assessment less than the alleged statutory

[19] Hard to ascertain facts about the use of reproduction cost and other forms of cost by state tax administrators in the United States in the valuation of railroads for the property tax are as follows: **1900-01**: Michigan State Tax Com. appraises railroad property and determines reproduction cost; **1903-04**: Wisconsin Tax Com. appraises railroad property and derives reproduction cost. Boyle, "Methods of Assessment as Applied to Different Classes of Subjects," 1907 Proceedings of National Conference of State and Local Taxation 128. **1911**: "A fundamental, though not necessarily a controlling element in value is cost of reproduction. This is true of property in general. . . ." Report of the Railroad Securities Commission appointed by the President (among others, Walter L. Fisher of Illinois and Frederick N. Judson of St. Louis) H. Doc. 256 (1911); **1913**: One of the controlling reasons for enactment of the Valuation Act of 1913 (49 U. S. C., § 19A.) Section 19A of the Interstate Commerce Act was passed March 1, 1913, and amended February 29, 1920, June 7, 1922, June 16, 1933, August 9, 1935) was "in connection with railway taxation." The Act required the ICC to determine an inventory of railroad property and value it, ascertaining original cost and cost of reproduction new less depreciation. Moore, "The Federal Valuation of Railroads in the United States", 54 *American Railway Engineering Association* 8 (1953); **1922**: Railroad counsel W. G. Brantley represented to the ICC ". . . the value of the railroad of the carrier is divided into a value of its tangible properties, and the value of its intangible properties meaning its franchises and its business; that the value of its tangible propetries at any given time is measured by reasonable cost to reproduce them at that time . . . that the value of its franchises and business is measured by a consideration of the earnings of the property, past, present and future, and of the right of the carrier to do business . . . as to this value the carrier's position is that its locomotives and cars, its rails and ties, its lands and structures, its embankments and excavations and all of its physical properties have the value of similar properties, similarly located elsewhere, and that such value is wholly independent of the earnings of the railroad, whether such earnings be great or small, or none at all." Memorandum to the ICC on the value of the Atlanta, Birmingham and Atlantic Ry. Co., May 13, 1922. See Tunnell, "Valuation for Taxation and Rate Making," 35 J. Pol. Econ. 1, 22-3 (1927); **1934**: ICC's Bureau of Valuation completed its valuation studies and issued a pamphlet, "A Summary of Valuations of the Steam Railways of the United States as of the years 1914-21 and 1927-28"; reproduction cost new of the industry on valuation dates was less than original cost. See Moore, op cit. supra, at pp. 23-24. **1938**: "Generally assessors and the majority of railroad tax attorneys are disposed to give consid-

standard); and (d) vastly increasing responsibilities of local government since World War II, increasing the tax burden as partially reflected in increas-

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eration to at least three factors in determining the net value [of railroads] . . . the cost of reproduction less depreciation. . . ." Mitchell, "Use vs. Ownership as a Basis for Taxation," 1938 Proceedings of the 31st National Conference of the National Tax Association (People's Second Brief, Appendix K, p. 59-B, II Ill. Sup. Ct. Rec. 88); **1944**: "The cost data compiled by the Interstate Commerce Commission are widely used both in making appraisals of railroads and in allocating units appraisals of interstate roads among the states and in which they operate." *House Doc. 160, 79th Cong., 1st Sess., p.* 112, *Ch. III of Staff Report to Board of Investigation and Research on Carrier Taxation;* **1950**: 22 states "give consideration" to "depreciated replacement cost;" 7 states, to "book cost;" 19 states obtain ICC reproduction cost data. Preliminary Report, Committee on Unit Valuation (National Association of Tax Administrators 13, 18-19 (1950) (unpublished) (9 copies on file with Clerk); an unpublished Report is dated as 1950 but was described in 1958 by John A. Gronouski, an economist (see p. 37 *infra*) as having been issued in 1948 and revealed that of 23 states reporting, "only seven failed to include depreciated reproduction cost" and that most of these used "depreciated book cost. Gronouski, "The Taxation of Utilities," *Michigan Tax Study* (Staff Papers) 297 306 (1958. **1953**: One of the principal uses of valuation date of the ICC is "supplying current reproduction valuations to states for taxing purposes." Moore, op cit. *supra* at 45; **1958**: "In railroad valuation chief reliance is placed on three such items of evidence: capitalized net earnings, stock and debt value and depreciated (original or reproduction) cost. Gronouski op cit. *supra* at 306. **1961**: "The other primary evidences of value are . . . . original and reproduction cost less depreciation . . . Many States, in making a unit appraisal of system value, will cross-breed some or all of these evidences of value." Rep. No. 445, U. S. Sen. 87th Cong., 1st Sess. 455-56; **1965**: ". . . according to an uncontradicted exhibit introduced in evidence by the defendants, the taxing authorities of 31 of our sister states give some consideration to the cost of reproduction, 'book value' or 'initial cost,' . . ." *Florida East Coast Rr. Co. v. Green,* 178 So. 2d 355, 358 (1965) (Fla.), affirming *Florida East Coast Rr. Co. v. Green,* Civ. No. 17709, Circuit Court of the Second Judicial Circuit, Leon County, Florida (March 27, 1964) ("some consideration is given to cost of 'reproduction', 'book value' or 'initial cost' by the railroad assessing authorities of the following states: Alabama, Arkansas, California, Delaware, Georgia, Idaho, Illinois, Indiana, Iowa, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode

ing tax rates. The efforts of the state tax administrators following World War II to eliminate underassessment and discrimination is described in Gronouski; "State Supervision of Property Tax Administration," National Tax Journal 158 (June, 1957); and in the pamphlet, "Equalization Programs and Other State Supervisory Activities in The Property Tax Field," No. RR-42 of Federation of Tax Administrators, 1313 East 60th Street, Chicago 37, Illinois (January 1957), nine copies of which are on file with the Clerk of this Court. The emphasis of the pamphlet is directed toward raising the level of assessment of locally assessed property and measurement of inequity and there is almost total silence about state assessments.

State administrative action making use of arbitrary "judgment factors" or similar techniques to suppress inflation in formulating railroad assessments has never been publicly acknowledged. But see the revelation of February 1, 1966 in Nashville, Tennessee. Appendix G at A-57-8 *infra*.[20] Even though their purpose has been proper, *i. e.*,

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Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington and Wisconsin," n. 10, p. 9, of opinion by Judge Hugh M. Taylor. Also at p. 9 there appears the following statement: "Mr. Edward F. Koncel [Illinois railroad assessor, 1961—] expert for the defendants, gave strong support to the propriety of considering cost of reproduction as a factor in valuing railroad property for taxation."

[20] Under date of June 5, 1963, Mr. James Dixey, a staff aid to the Tax Commissioner of Ohio, acting in his capacity as Chairman of the Committee on Ad Valorem Taxation of Railroads and Public Utilities of the National Association of Tax Administrators (NATA), 1313 East 60th St., Chicago, Illinois, sent to Hon. Clarence Lock, President of NATA and Commissioner of Revenue in Michigan a tabulation summarizing responses from state tax administrators in 44 states to a questionnaire. The questionnaire is entitled "Relative to Discrimination in the Assessment of Public Utility Property as Against Other Types of Property." Question 20 was, "Where the statute requires that public utilities be assessed on a full value basis would you say there is some tendency, admin-

implementing constitutional mandates of uniformity between state assessed railroad property and locally assessed property, the lips of the state administrators have been sealed by the pervasive statutory illegality which has always characterized the administration of the property

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istratively, to debase the full value assessment level prevailing locally?" Out of 35 responses to the question, 19 answered "Yes." Question 21 was "If the answer is yes, could you specify a figure (5%, 10%, 20%, etc.)?" There were no responses. Question 23 was "Is there a program in your state to bring the assessment levels of centrally assessed and locally assessed property closer together?" 26 (including Illinois) of 38 states responding to the question answered "yes." Question 25 was "How is this program carried out? (gradual reduction of central assessment ratio; increase in ratio on locally assessed property; or both; holding utility level constant while local ratio raises, etc.). *19 state administrators acknowledged* "Administrative tendencies to debase full value assessments of public utility property to allow for lower assessment level prevailing locally;" 16 state administrators denied it and 9 did not respond to the question. See pp. 15, 24 of the Questionnaire. Nine copies of the papers and covering letter are on file with the Clerk.

(b) In January, 1957, the Federation of Tax Administrators compiled a document (No. RR-42) "Equalization Programs and Other State Supervisory Activities in the Property Tax Field." Table III following p. 15 revealed that assessment ratio data is used to equalize "state assessed, local taxed, property with local assessment" in California, Illinois, Iowa, Missouri, New Hampshire, Washington, and Wisconsin (The text on p. 15 renders the meaning clear: debase rail assessments having discovered from the data the level of assessment of locally assessed property.) Nine copies of the document are on file with the Clerk.

(c) In June, 1957, the Illinois Legislative Council in Bulletin 3-018, "Equalization of Property Tax Assessments," stated on p. 3: ". . . full value of railroad operating property . . . is debased before certification to accord with prevailing assessment levels in the particular county to which the certification is made" (Peo. Ex. 1A, I Exhibits).

(d) In 1955, Mr. Allen Weston, Director of the Railroad and Utilities Division of the Michigan State Board of Assessors stated, "Thus, over the years we have found ways of adjusting physical valuation to reach a level of assessment which is in line with property generally in the state." 1955 Proceedings of the National Tax Association 127-29 (People's Second Brief 45-B, II Ill. Sup. Ct. Rec. 88). See also Peale, *"A Comparative Study of Property Tax Administration in Illinois and Michigan"* 99-100 (1950) (U. of Mich. publication).

tax, *i. e.*, underassessment at levels less than the standard required by statute.[21] An unconscionable web of circumstances has prevented the state administrators from candidly describing their uniformity efforts. They will not admit publicly that local officials are or may be violating statutory provisions in making assessments. They will not publicly admit that they, themselves, are not, or may not be, equalizing local assessments at full value,[21a] nor will they admit that they have been arbitrarily eliminating inflation from railroad assessments for to do so would admit statutory illegalities vis a vis railroad assessments and by implication admit that other violations by local officials and perhaps themselves are being committed vis a vis locally assessed property. In short, they will not openly admit statutory violation. See Appendix B at A-23 and Appendix G at A-57-58 *infra*. The necessity for silence is all the greater because since World War II assessments are increasingly being used to measure state aid to local government units; the higher the level of assessment the less the state aid;[22] the political

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[21] The June, 1963, Report (Vol. I) of the Advisory Commission on Inter-Governmental Relations, entitled, "The Role of the States in Strengthening the Property Tax", at pp. 43-44, stated: "The law of nearly two-thirds of the states appear to contemplate assessment at full value." "The assessment practice in most of the states bears little resemblance to the legal requirements. The actual level of assessment is below the full-value or fractional value prescribed by constitution or statute . . . Deep underassessment on virtually a nationwide basis was disclosed [proved] by the Census Bureau's assessment-sales ratio study for the 1957 Census of Governments . . . Underassessment . . . have long traditions, but since World War II the pernicious effects of these alleged assessment practices have intensified with the deepening of underassessment . . . and the growing dependence on assessed valuations for other than tax base purposes."

[21a] "It has been a common experience to have tax administrators indignantly reject that their valuation was anything less than legally required." *Jensen, Property Taxation in the United States* 283 (1931) (U. of Chi. Press).

[22] "Equalization Programs and Other State Supervisory Activities in the Property Tax Field" 15 (Federation of Tax Administrators RR. 42 (1957) (on file with Clerk); U. S. Bureau of the Census, Census of Governments: 1962, Vol. IV, No. 2, "State Payments to Local Governments" 7-10, 29-30.

consequences of candor by state administrative officials are stifling. Thus when the railroads assert in trade literature,[23] before the National Tax Association[23a] before the American Bar Association Section on Public Utility Law,[24] in Congress,[25] and in Court[26] that state administrative officials are assessing their property at full value,[26a] there is no denial—not even that the assertions are exaggerated.[27]

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[23] "Tax Outrage," *Railway Age* 21-22 (December 1963) (claiming that of $193,296,558 ad valorem taxes paid by railroads in 24 states for 1961, $112,979,417 or 58.45% was excessive because of discriminatory levels of assessment.

[23a] Ogden, "Railroads Deserve Tax Equality," 1960 *Proceedings of the National Tax Association* 378, 387 (Mr. Ogden is counsel for the GM&O). Mr. Ogden's data is the same data supplied to a Senate Committee in 1961 by the American Association of Railroads. See n. 25 *infra*.

[24] Pierce, "The Case Against Discriminatory State Assessment of Railroad Property for General Property Tax Purposes," 70 Public Utilities Fortnightly No. 7, 434, 439 (1962) (Address delivered in August, 1962, by counsel for the Southern Pacific). Mr. Pierce's data was identical with data supplied to a Congressional Committee by the American Association of Railroads in 1961. See n. 25 *infra*.

[25] Report No. 445, U. S. Sen., 87th Cong., 1st Sess., 486-7 (1961), the American Association of Railroads presented a data display to demonstrate that of $260,061,831 of ad valorem taxes paid in 31 states for 1957, $141,187,829, or 54%, was excessive because of discriminatory levels of assessment. At p. 487, the Committee stated, "The resources available to this committee were not such as to be able to conduct an independent survey to affirm or disprove the specific data presented to us."

[26] *E. g.*, the cases at bar.

[26a] As of 1956, the statutes of at least 39 states required 100% of value assessments: Arizona, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, North Carolina, Ohio, Rhode Island, Tennessee, Texas, Virginia, West Virginia and Wisconsin (Also the District of Columbia). Commerce Clearing House State Tax Reporter. For the states which tax railroads by the ad-valorem method and centrally assess their property using cost as an element of value see n. 19 at pp. 32-33 *supra*.

[27] "No state probably ever achieved a complete 100% valuation. There are good reasons for suspicion when anything like a full

The state administrators and their immediate principals, the elected state officials, and therefore the People, are—in the face of contemporary railroad protestations about their property taxes—pinioned by the historic conflict between law and practice which characterizes the administration of the property tax.[27a] In our system only this Court can unpinion the People who now, together with the railroad industry, rely on the Fourteenth Amend-

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value assessment is claimed." *Jensen, Property Taxation in the United States* 83 (1931) (U. of Chi. Press). The silence is all the more explainable if in addition to statutory violations there is in existence constitutionally vulnerable "de facto" classification not involving railroads, which may help to support political empires. See Newhouse, op. cit. *supra* at n. 4, p. 7, at 29-30; n. 27a *infra* at p. 37; R. 300, 295-99, Vol. I, Testimony.

We invite this Court to compare the statements of the opinion of the Court below at A-14-15 with the statement in 1958 of John A. Gronouski, Jr., economist, educator, former research associate in Chicago with the Federation of Tax Administrators, 1952-56, Wisconsin Tax Commissioner (1960-1963), Postmaster General (1963-65) and presently United States Ambassador to Poland, former member of the Executive Board of the American Economic Association and member of the Editorial and Advisory Board of the National Tax Journal: **"IN DERIVING A SINGLE VALUATION FIGURE ON THE BASIS OF THE EVIDENCE EMPLOYED, THE STATES ARE DIVIDED BETWEEN THE USE OF A FORMULAIC AND A JUDGMENT APPROACH. .ILLINOIS, FOR EXAMPLE, TAKES A SIMPLE AVERAGE OF REPRODUCTION COST DEPRECIATED, CAPITALIZED EARNINGS, AND STOCK AND DEBT VALUE."** Gronouski, "The Taxation of Utilities, Michigan Tax Study (Staff Papers) 306 (1958). Mr. Grounouski wrote a Ph. D. thesis, "Valuation of Railroads for Ad Valorem Tax Purposes," Doctoral Dissertation Series Publication No. 14, 701, Universal Microfilms, Ann Arbor, Michigan (1955). See Who's Who in America (Marquis Co., 1964-65, p. 2264).

[27a] Property taxation is "the Dark Continent of Public Finance." Welch, "Some Observations on Assessment Ratio Measurement," 17 Nat. Tax J. 13 (1964) (the author in 1964 was Asst. Executive Secretary of Property Taxes, California State Board of Equalization). See *Lutz, The State Tax Commission* (1918) (Vol. XVII, Harvard Economic Studies); for the period 1850-1890, see *Benson et al., The American Property Tax: Its History, Administration, and Economic Impact* 53 (Claremont College Press, Claremont, California 1965).

ment. The questions presented deserve plenary consideration.[27b] Cf. **Brown v. Board of Education, 347 U. S. 483 (1954); Baker v. Carr, 369 U. S. 186 (1962).**

In the light of these considerations, it is of the utmost public importance to governance and the People that the Court bestow plenary consideration on the questions presented. Due process standards of judicial performance and apposite decisions of this Court requiring that findings of fact be based on rational evidence must be followed in state court proceedings applying constitutional mandates of uniformity for the benefit of railroad taxpayers. The problems are new and the application of due process concepts to them is needed. Arbitrary utilization by the state judiciaries of the arbitrary "judgment factors" developed in the administrative process which elimimate the influence of inflation in judicial value finding will create a preference for the railroads just as violative of uniformity mandates as the discrimination for which the trial court in Madison County in 1964 and a federal judge in Nashville this month gave relief. See Appendix G at A 53-71 *infra*. **Cumberland Coal Co. v. Board, 284 U. S. 23-25, 30-1 (1931)** (discrimination resulting from arbitrary valuation methods). See Leland, The Classified Property Tax in the United States 52, 58 (1928).

We invite the Court's attention to principles announced by this Court which are relevant here. In 1908 Mr. Justice Holmes wrote ". . . Neither the state courts nor the legislatures by giving the tax [here, value finding] a particular name [here, "judgment factor"] or by use of some form of words can take away our duty to consider its nature and effect." **Galveston, H. O. Ry. Co. v. Texas, 210 U. S. 217, 227 (1908).** In many cases, the Court has

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[27b] **"The tax seems sure to remain the chief source of funds for local government and hence to retain its role as a vital factor in the American federal system."** Benson et al, op cit. *supra* at n. 27a, p. 37, at p. 73.

announced that it will look through form to substance. **Williams v. Mississippi, 170 U. S. 213, 225 (1898); Western Union Tel. Co. v. Kansas, 216 U. S. 1, 27 (1909).** This Court will analyze the facts to pass on the federal questions. **Smith v. Illinois Bell Tel. Co., 282 U. S. 133, 149, 162, 164, 169 (1930) (value finding); Lindheimer v. Ill. Bell, 292 U. S. 151, 155 (1934) (value finding); Northern Pac. Ry. Co. v. North Dakota, 236 U. S. 585, 593 (1914); Fiske v. Kansas, 274 U. S. 380, 385-6 (1927); Napue v. Illinois, 360 U. S. 264, 271-2 (1958).**

4. Arbitrary State Judicial Action Finding Railroad Values While Enforcing Constitutional Mandates for Property Tax Purposes Portends Curtailment of State Administrative Processes.

We can find no decision of this Court where state judicial action in state tax uniformity litigation is challenged here as violative of the Fourteenth Amendment. Invariably the cases brought here have involved challenges to legislative and administrative action.[28] Whatever reasons there are for deference by this Court to state action the reasons for deference are less in reviewing state court judicial action enforcing constitutional mandates involving matters subject to expert administrative processes. Particularly in constitutional value finding by state courts the potential for serious error is glaring. Limited by the

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[28] Sixty-nine years intervened between *County of San Mateo v. So. Pac. Ry. Co.*, 13 Fed. 722 (1882) (D. Cal.) (Field, J., on circuit), dismissed per stipulation, 116 U. S. 138 (1885) and *Walters v. City of St. Louis, et al.*, 347 U. S. 231 (1954). During that period less than ten property tax cases came up from state courts and invariably the state court had declined to interfere with the state legislative and administrative processes. *E. g., Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441 (1923). Similarly cases coming up from federal courts did not involve challenges to state judicial action. *E. g., Hillsborough Township v. Cromwell*, 326 U. S. 620 (1945).

rigors of the adversary process the judiciary is bound by the record and the flexibility and full time expertise of the administrative process is lacking. More significantly a misstep by the state judiciary in constitutional value findings will have permanent or long range effects which can only be altered by constitutional amendment, whereas, errors by legislators or administrators are subject to easier rectification through the channels of political life. Cf. **Burrows v. Jackson, 346 U. S. 249, 257 (1953).**

The upshot is that in the type of cases now before the Court the state action below has bound the state administrative process by mandating removal of inflation in the administrative valuation process for railroad property. See Appendix A *passim*. The viability of the administrative process is thereby very much restricted if not destroyed. In short, the state action challenged here commands the administrator that the maximum valuation for railroad property cannot be increased by continuing inflation or reflect past inflation or reflect property acquisitions.[29] No other type of property taxpayer in the United States had such shelter.

What is at stake here is the application of federal constitutional limitations applied to state judicial action which at the instance of the railroads will, if arbitrary

[29] In 1963 the Director explicitly equalized railroad assessments pursuant to new legislation. The 1964 and 1965 railroad assessments distributed to Madison County were successively lower than the 1963 assessments despite vastly improved railroad fortunes. It is reasonable to infer that the Director has abandoned the formula or more probably retained its form and gradually moved to eliminate the influence of inflation in respect of judicial mandate by gradually moving "judgment factor" dollars present in 1962 above the line of the annual average as deductions from the cost factor—at the rate of 3 for 1. If the inference is correct, it follows that as railroad capitalized income and securities values increase, the reduced cost factor in time may be used as a debasing factor to render valuations less than the average of capitalized income and security values, as was the case for some railroads, 1951-1962. See Appendix E at A-31 *infra*.

or otherwise violative of the Fourteenth Amendment, render impotent the state administrative processes in valuing railroad property as inflation continues and property tax burdens continue to increase.

5. Congressional Action as Well as Constitutional Duty Impels Plenary Consideration.

Challenges to State judicial action under the Fourteenth Amendment in the ad valorem tax field are entitled to especial attention by the Court because of Congressional action. Congress has evidenced the intention that state courts handle local tax questions even though they involve federal rights guaranteed by the Fourteenth Amendment. In 1937, the Johnson Act was passed to eliminate the federal district courts (and thereby the Courts of Appeals) in matters involving local taxes unless an aggrieved party can show that the state legal machinery does not provide an adequate remedy. 48 Stat. 775 as amended, 50 Stat. 738, 28 U. S. C. (§1341(1)). If the Congressional purpose is to be effectively and fairly implemented it is imperative that State judiciaries receive the benefit and the guidance of standards which only this Court can develop in the context of the Fourteenth Amendment, particularly in matters of judicial value finding, which is requisite to enforcement of state and federal constitutional mandates of uniformity.[30]

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[30] **The questions presented have, within the month, taken on an even vaster dimension. On February 1, 1966, Federal Judge William E. Miller filed an opinion in L. & N. Rr. Co. v. Pub. Serv. Com. et al., Civ. No. 4310, Middle District of Tennessee, Nashville, Tennessee. See Appendix G at A-53-71** *infra.* **One significance of that decision is that it opens the federal courts to railroad property tax discrimination claims for invalidation of State action under the Fourteenth Amendment. If the decision stands either because it is not appealed or is affirmed, the federal judiciary is now brought to discharge value finding responsibilities. Judge Miller's disposition of the case did not require the Court to find railroad values. See A-58** *infra,* **but value finding is the next step. If the lower federal courts are to be**

6. The Judgments Below Conflict With Two Recent Equal Protection Decisions of This Court; These Two Recent Decisions Are in Conflict With a 1940 Decision of This Court; At Least Two State Court and Two District Court Decisions Are Also in Conflict With the 1940 Decision.

Whether in finding railroad values the Supreme Court of Illinois applied state constitutional mandates or Fourteenth Amendment mandates, the questions presented require consideration of conflicting decisions of this Court concerning the applicability of the equal protection clause to property tax discrimination as between state assessed railroad property and locally assessed property. The method of effecting discrimination in the cases at bar is by state judicial action utilizing arbitrarily disparate valuation methods, *i. e.*, eliminating inflation for railroad property and relying on it exclusively for locally assessed property, producing railroad levels of assessment which are arbitrarily erroneous to the detriment of the People. Such a method is proscribed by the equal protection clause. **Cumberland Coal Co. v. Board, 284 U. S. 23 (1931).**

The People's position is that the equal protection clause does prohibit arbitrarily disparate levels of assessment between state assessed property and locally assessed property—whichever direction the discrimination goes. Here,

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involved in value finding at least during the years until a case is brought here for decision plenary consideration of the questions presented here will aid in the supervision of the federal courts in the value finding process. If the federal court's action is in violation of the Johnson Act (see p. 7, infra), then the reason for substantiality here presented is still pertinent. For mention of the conflict in state and federal courts on the application of the Fourteenth Amendment in railroad property tax discrimination cases, highlighted by the February 1, 1966 decision, see pp. 43-45, infra.. Judge Miller's opinion was presented in full on pp. 6-7 of the Nashville Tennessean for February 2, 1966, under the title "Federal Court Intervention Quizzed."

the state action discriminated against the People and therefore violated the Fourteenth Amendment.

If, as a matter of definition, state assessed railroad property is of the same class as locally assessed property in deference to the law of Illinois—the postulate of the cases below—the judgments below conflict with **Hillsborough Township v. Cromwell, 326 U. S. 620 (1945)**, which held on the pleadings that state administrative action creating arbitrarily disparate levels of assessment between properties of the same class for purposes of the property tax is violative of the equal protection clause. If, however, state assessed railroad property is of a different class than locally assessed property, the judgments conflict with **Walters v. City of St. Louis, 347 U. S. 231, 237 (1954)**, which stated that:

> "Equal protection does not require identity of treatment. It only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatment be not so disparate, relative to the difference in classification, as to be wholly arbitrary."

The Court has not applied this standard since 1954 and its application will help to clarify equal protection limitations. The People do not see anything but feigned differences which explain the arbitrary judicial exclusion of inflation from valuation of railroad property nor any relevance of such disparate treatment to distinguishing between the two properties which perhaps only differ because of a division of assessment responsibility. State action in utilizing "the judgment factors" is wholly arbitrary and conflicts with **Walters**.

Whatever the answer to the "class" or "interclass" riddle, both **Hillsborough** and **Walters** confirmed that there are limits imposed by the equal protection clause on

state action in distributing the property tax burden. Therefore both decisions are in conflict with **Nashville, C. & St. L. Ry. v. Browning, 310 U. S. 362 (1940)**, which in the strongest *dicta,* if not in holding, announced that discrimination between state assessed railroad property and locally assessed property was not prohibited by the equal protection clause.

The cases at bar can be distinguished from **Browning** which seems to deny that state action which discriminates against the People in favor of state assessed railroads violates the equal protection clause. In **Browning,** the discrimination was of long standing and was practiced by the administrative process. Here the discrimination arises from the judgment below and was affected by judicial action on a constitutional level. In any event, the substance of **Browning** has been substantially drained by **Hillsborough** and **Walters.** Questions calling for clarification of the present day vitality or moribundity of **Browning** deserve plenary consideration.

State court decisions have refused to follow **Browning. Del, L. & W. Rr. v. Neeld, 130 A. 2d 6, 9, 11-2 (1957)** (N. J.) (relief denied because of failure to exhaust administrative remedies); **Central Rr. et al. v. Neeld, 139 A. 2d 110 (1958) (N. J.)** (by implication) (relief denied because of failure to exhaust administrative remedies); *cert. denied* **357 U. S. 928 (1958); So. Pac. v. Cochise County, 377 P. 2d 770 (1963)** (Ariz.) (on pleadings). There is a growing number of state court decisions which perhaps by implication are also ignoring **Browning:** those cases cited in n. 18 *supra* at pp. 29-30, which on pleadings or otherwise hold that the railroad taxpayer is entitled to relief from disparate levels of assessment. Many of these decisions do not discuss the basis for relief.

Moreover, two federal district court decisions have refused to follow **Browning. Del., L. & W. Rr. v. Kingsley,**

189 F. Supp. 39, 46-50 (D. N. J. 1960) (relief denied because of adequate state remedies, 28 U. S. C., §1341); **L. & N. Rr. Co. v. Public Service Com. of Tennessee, Civ. No. 4310, M. D. Tenn., Feb. 1, 1966** (relief granted) (in conflict with **Kingsley**, *supra*, on adequacy of State remedies) (perhaps the first Federal District Court decision since 1937 to order relief for a railroad taxpayer under Fourteenth Amendment) (valuation of railroad property not reached). See Appendix G at A. 53, 66-68 *infra*.

Movement by railroad property taxpayers into state and federal courts within the past decade is at this time culminating a momentum which has led inexorably to reappraisal by this Court of **Browning** and reconsideration of the Johnson Act to apply Congressional intention to current railroad remonstrances. The cases at bar present questions which involve a common denominator underlying both sets of conflicts, which is Fourteenth Amendment limitations on judicial value finding. If property tax discrimination involving the railroads is to be the subject of judicial action, the cases at bar offer an approach to the applicability of the Fourteenth Amendment at the behest of the People, not the railroads. By 1966 the art of property tax administration has advanced in quality; since 1940, measurement of inequity is more precise and the judiciary with the guidance of this Court can enforce constitutional mandates with a surer hand.

CONCLUSION.

Plenary consideration of the questions presented will aid the People of the United States, contribute to the strength of local government, enhance the integrity of the property tax, and advance the proper ordering of the judicial system, state and federal, in implementing constitutional guarantees, with deference to Congressional intent as to the proper judicial forums. All this as the

American people during the next fifty years grow to the 400,000,000 mark.

For the foregoing reasons, jurisdiction should be noted and certiorari granted.

Respectfully submitted,

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February 19, 1966.

APPENDIX A.

In the Supreme Court of Illinois.

(Nos. 38859-38904.—Reversed and remanded.)

The People ex rel. George Musso, County Collector, Appellee, v. Chicago, Burlington & Quincy Railroad Co. et al., Appellants.

Opinion filed June 24, 1965.—Rehearing denied Sept. 27, 1965.

Appeal from the Circuit Court of Madison County; the Hon. James O. Monroe, Judge, presiding.

Burroughs, Simpson and Burroughs, of Edwardsville, and R. T. Cubbage, T. G. Schuster, and John H. Bishop, all of Chicago, (Eldon Martin and C. W. Krohl, of counsel,) for appellant Chicago, Burlington & Quincy Railroad Company.

Hugh J. Dobbs, of Springfield, T. G. Schuster, of Chicago, and James R. Parham, of East St. Louis. (James N. Ogden, Louis F. Gillespie, Eldon Martin, Jordan Jay Hillman, George M. Hollander, Gillespie, Burke & Gillespie, Pope & Driemeyer, Peter Herzog, Coburn, Croft & Kohn, Wayne P. Williams, Walker & Williams, John F. McCarthney, Gordon Burroughs, Robert E. Eggmann, Roberts, Gundlach, Lee & Stubbs, John F. Schlafly, and Schlafly, Godfrey & Fitzgerald, of counsel,) for other appellants.

Joseph R. Bartylak, State's Attorney, of Edwardsville, and Burton C. Bernard, Assistant State's Attorney, of Granite City, (Dick H. Mudge, Jr., of counsel,) for appellee.

Mr. Justice House delivered the opinion of the court:

Twelve railroads filed objections to taxes levied against their operating properties in Madison County for the years 1957 to 1962 inclusive, and seek a return of that portion of the taxes paid under protest. They contend that their Illinois property was assessed at full value while the equalized value of locally assessed property did not exceed 55% of full fair cash value in any of the tax years involved, and that the discrimination is so gross that it is constructively fraudulent against them.

The objections were consolidated for hearing by the circuit court of Madison County. It found that locally assessed property, after equalization, had been assessed at county-wide levels from 48.14% to 51.40% of fair cash (full) value, that the railroads properties were likewise undervalued at 58% to 85% of full value and that the disparities were so great as to constitute gross discrimination against objectors. The refunds ordered were not in dollar amounts but in percentages and the parties were to make the computations. The measure of refund was the difference between the railroads' taxes and the amounts they would have paid if all property in the county had been assessed at full value. The amount of each such refund was limited by (a) giving effect to any other refunds (from excess rates and the like) and (b) the amount of the protest. Jurisdiction was retained to approve or correct the computations and to "implement" the process of refund. The railroads perfected these 46 appeals directly to this court. The Collector has not appealed from the orders finding the percentage debasement of locally assessed property, nor has he cross-appealed from the findings of gross discrimination against the railroads or the orders for refund.

This is the second case in the series of railroad objection cases which have not contested the debasement of locally

assessed property as disclosed by the ratio studies of the Department of Revenue. (See **People ex rel. Korzen v. Chicago, Burlington & Quincy Railroad Co.**, Docket No. 38942). The only issue, therefore, is whether the railroads' properties were assessed at full, fair, cash value for the years in question. This should involve only a question of fact, to be viewed in the light of the law as developed and crystallized through a succession of these cases. While the Collector recognizes and appears to accept the principles developed in **People ex rel. Hillison v. Chicago, Burlington and Quincy Railroad Co.**, 22 Ill. 2d 88; **People ex rel. Kohorst v. Gulf, Mobile and Ohio Railroad Co.**, 22 Ill. 2d 104; **People ex rel. Dallas v. Chicago, Burlington & Quincy Railroad Co.**, 26 Ill. 2d 292; **People ex rel. Wenzel v. Chicago and North Western Railway Co.**, 28 Ill. 2d 205; **People ex rel. Enrietta v. Gulf, Mobile and Ohio Railroad Co.**, 29 Ill. 2d 605, and earlier decisions, there is woven into the fabric of his argument in applying the law to the evidence the constantly recurring theme that the Directors of Revenue have, since 1949, sought to do equity through debasement of railroad values by the application of their judgment and thereby "hold the line" against widening the gap between State assessed railroad property and locally assessed property. Thus, while giving lip service to our approval of valuation methods (in some cases the same railroads' objections were before us for the same years here involved), the net result is an indirect attack upon those methods.

This whole argument is predicated upon the theory that in the prior cases the background evidence was insufficient to reveal the valuation methods at the State level over an extended period of time. In counsel's language: "The magnitude of the new explanatory evidence and the insight it permitted led the trial court to a consideration of several legal points which this Court was not called upon to confront in the four prior cases [**Hillison, Kohorst,**

Wenzel and **Enrietta**] because of the limited records, including the presumption of constitutional compliance by the Directors."

There has been offered by the Collector much evidence by way of exhibits, some or all of which were not presented in one or more of the previous cases. For example, the ten annual reports of the Illinois Tax Commission covering the period 1933-1942 are in this record while the first five of such reports were not previously included; data sheets for all Illinois railroads from 1951 to 1963 are in evidence and in previous cases only those of the subject carrier and subject years were introduced, although expert testimony was predicated upon examination of all such sheets. In addition, annual reports of the Department of Revenue since 1945, annual reports to stockholders of various railroads, railroad information schedules returned to the Department, United States census data, Interstate Commerce Commission reports and procedures, graphs based upon exhibits and other documents have been offered. Many of the same exhibits have been introduced by both parties. Objections have been made by the railroads that some of the literature, price indices and other materials were never admitted in evidence. A stipulation provides for the admission of evidence without a foundation being laid and is sufficiently broad to encompass almost any public document, although it contains the limitation that all were subject to objection as to relevancy, materiality or competency. There is no point in ruling on each exhibit. It is sufficient to say that out of this welter of exhibits, making a record of gargantuan proportions, we have considered only those in the record or those of which we may properly take judicial notice.

The Department of Revenue took over railroad assessment and valuation duties of the Illinois Tax Commission subsequent to the adoption of the Revenue Act of 1939. During the taxable years in question and earlier, section 80

of the act, (Ill. Rev. Stat. 1961, chap. 120, par. 561,) provided that the Department determine and assess at fair cash value the operating properties of the railroads in this State. In doing so it was to take into consideration the market value of stock, bonds and other applicable indebtedness for the preceding 5 years; the net earnings for the preceding 5 years, "and such other information as the Department may consider as bearing on the fair cash value of the property: Provided, that the facts hereinbefore named shall not be conclusive upon the Department in determining the fair cash value of the property of a railroad company." The method used by the Department under this statutory directive is explained and illustrated in **Chicago and North Western Railway Co. v. Department of Revenue**, 6 Ill. 2d 278, and **Chicago, Burlington & Quincy Railroad Co. v. Department of Revenue**, 17 Ill. 2d 376.

Three evidences of value: capitalized earnings, market value of stock and debt, and reproduction cost less depreciation have been in use, in varying degrees, at least since 1933. The Tax Commission's report for that year, commenting upon methods used to determine system values named the following: (1) original cost plus additions less depreciation or reproduction cost less depreciation; (2) capitalization of net earnings; and (3) stock and bonds value. It went on to say, "These three methods of valuation condition and limit each other so that a fourth method, which is a composite of the above or a weighting of the various factors previously enumerated, ought to be identified. The composite method rests upon the theory that no one valuation formula is satisfactory and that true values can only be determined by a consideration of all of the elements above enumerated. * * * Primary emphasis, it is believed, should be given to earnings and stock and bond quotations in the valuation process. It is felt that these are a better reflection of the current market value of a railway than original cost." It will be noted that

the formulaic result obtained by taking the average of the three valuations was not recommended. Furthermore, subsequent annual reports show conclusively that the three factors were not given equal weight. (For example, railroad valuations varied from 58% above the straight average in 1933 to 1% below such average in 1939.)

The reports of the Tax Commission for 1939-1940 again referred to the three factors, pointing out the strengths and weaknesses of each. While recognizing the desirability of a formula, the use of judgment was said to be necessary in the following language: "The development of rules of procedure for analysis of pertinent data, therefore, evidences an improving standard of administration. Such a tendency does not necessarily imply the abandonment of all non-measurable elements of judgment and reduction of the process of arriving at an assessment to a mechanical formula. All through the process of determining an assessment the necessity for utilizing judgment arises, and in the final summary the 'tangled impressions' act directly upon the result." (The term "tangled impressions" refers to Mr. Justice Holmes description of the process of arriving at valuations in **Chicago, Burlington & Quincy Railroad Co. v. Babcock**, 204 U. S. 598, 51 L. ed. 636, where he said, "They express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions,—impressions which may lie beneath consciousness without losing their worth.")

The Commission's last reports for 1941-1942 referred to the current upswing in railroad earnings and though stating that other factors (stock and debt and reproduction cost) were considered, nothing is said to indicate the use of a fixed formula.

The 1943-1945 combined reports by the Department and those for 1945-1949 shed little light on assessment methods. The latter indicate that the 1946 and subsequent railroad

assessments were made in accordance with the full value assessment legislation adopted in 1945, and state, perhaps significantly, "Departmental assessments were made and certified to the local taxing districts at full value." Counsel for the Collector concedes that there is little available documentary information of the use of a formula during the 1940's and none after the early 1940's, except for a memorandum by Lynn A. Stiles dated January 28, 1949 (which was not then admitted), but which Stiles referred to when he testified. He stated that the formulaic approach (average of the three factors) was closely followed in the years 1943-1949. However, his recollection was that the assessments varied 5% or 10%, plus or minus, from the formula and conceded "* * * but I would be more comfortable in recollection with a ten percent spread in (sic) either side."

The historical background does not support the Collector's thesis that a straight formulaic arithmetical approach has been adopted. It shows rather that judgment, whether designated by that term or not, has always been used in the valuation process. We now proceed to examine the evidence which according to the Collector's theory, establishes a "hold the line" policy since 1949.

Harry L. Hulman became Deputy Director of the Department of Revenue in 1961 and Director in September 1963, and participated in railroad assessments in 1961 and 1962. In both years a judgment factor was applied to the formulaic result. A total railroad valuation was fixed at 1 billion 32 million dollars for 1961 and at 999-plus million dollars for 1962. The judgment factor was said to vary among the railroads to achieve those total figures, not in an effort to keep the assessments level but to determine proper assessment. For the first and only time, so far as we are aware, the phrase "hold the line" was used when Director Hulman said, "* * * and more or less arbitrarily we took the figures and tried to hold the line as close as

we could to the 1960 assessment until such time as we could delve into railroad assessment further and make a study of it". He testified that he examined all of the data sheets and that no one in the Department abused their responsibility in making the 1961 and 1962 assessments. He also testified to the method of assessment he used in 1963 to implement the 1963 amendment to section 80. The amended section is the same as heretofore quoted except that the Department is now to apply an equalization factor to full value, which factor is the State-wide average ratio of assessed value of locally assessed property to the full value of locally assessed property. He stated that he used the straight formulaic average of the three factors (without application of a judgment factor) and then applied a 50% equalization factor. This method is, of course, not in issue here, since it was used in a year subsequent to the years for which objections were filed and being heard in these proceedings.

Edward F. Koncel, who had railroad tax background, succeeded Raymond L. Danis as Supervisor of Railroad Assessments in November 1960 and worked up the rail valuation figures for 1961 and 1962. He was familiar with methods Danis used in 1959 and 1960 and he used the same methods of arriving at valuations in the two subsequent years. He testified that the assessments were at full value and in reply to a question as to whether the findings of full fair cash value by the Department debased or equalized its railroad assessments he said "no". He stated that the small reductions of railroad assessments in 1961 and 1962 were less than the decline of all three indicators of value, or any one of them.

Leo Cohen, Professor of Economics at Southern Illinois University, testified as an expert for the Collector. He recognized the possibility of corrections within each component factor, but when the three were added together and divided by three, thereby producing a straight average,

he stated that judgment should not be applied. He does not say that full value was never attained but says that in his opinion the application of the judgment factor was wrong. In summary, he has his own theory of how the valuations should be obtained, which is different from that used in Illinois and approved by this court.

We have heretofore commented upon the evidence of former Railroad Assessor Stiles. Professor Rolf Weil testified in behalf of the Collector but only with respect to valuation of locally assessed property, which is not here in issue.

As pointed out by Collector's counsel the primary sources of information from 1949 to 1960 are the data sheets and the testimony of Raymond S. Danis. Danis worked for the Department of Revenue and its predecessor the Tax Commission from 1933 until his retirement in 1960. He was Railroad Assessor for 2 years and then became Supervisor of Railroad Assessments, later known as Railroad Assessment Supervisor. It was his duty to arrive at a valuation which was then recommended to the Director for final assessment. The director usually used his valuation as the assessment figure with minor adjustments. Upon final assessment it was his duty to certify the assessments to the counties. He testified that the method of arriving at railroad property valuations was practically unchanged from 1933 to 1960 except for a minor change which will hereafter be referred to. The statutory factors of capitalized earnings and market value of stock and debt were used together with cost of reproduction less depreciation. The average of the three factors was then taken to guide in the appraisal. Other information considered relevant was taken into consideration and applied to such average in the exercise of what he said was commonly called "the judgment factor", and that such judgment factor has always been applied. He testified unequivocally that to the best of his judgment the

valuations fixed by him were the full fair cash value of each railroad in each year.

Danis made a minor change in procedure in 1957. The judgment factor was applied to the straight average until that time, but he then inaugurated a new type of explicit adjustment to the cost factor by a reduction for obsolescence (in addition to one for uneconomic property) before applying a final judgment factor to the average thus obtained. He is criticized by Collector's counsel for making reductions from the formulaic averages after the explicit reductions were made. It is also inferred that his testimony in the several cases over the years has been inconsistent. No foundation was laid for impeachment of Danis and he was not in fact impeached. A careful reading of this man's testimony indicates no evasion, and surprisingly few discrepancies in his testimony in this case, or between his testimony in the several cases, considering the magnitude of the subject matter covered.

Charles M. Chapman, an expert in this field, was familiar with railroad valuation methods in Illinois and said that the three factors were used in some other states with emphasis upon capitalized income. He stated that every tax assessor is expected to exercise judgment. He was particularly critical of any extensive use of reproduction cost because price indices indicate that some items of property rose 300 percent or more of original cost since World War II. He said that cost, in any form, necessarily represents value only at the time of construction. Original cost probably must have been justified or the line would not have been built, but when the returns do not justify the investment there is a constantly increasing variation between the value and historical cost, and the gap becomes even wider by applying current prices to reproduction new.

Broley E. Travis, a consulting valuation engineer, expressed the opinion that it was sound appraisal practice to

adjust an arithmetical result, and that based on the chart the 12 Madison County railroads were assessed at least at full, fair cash value between 1951 and 1962.

H. Clyde Reeves, with wide experience in the railroad valuation field with the State of Kentucky, was also critical of giving any substantial weight to reproduction cost and approved the use of judgment. He testified that if a formula incorporated Interstate Commerce Commission valuations as substantial indices of value, that a substantial judgment factor must be used "to get them out". As to the Gulf, Mobile and Ohio Railroad 1959 assessment it was his opinion that it was on the high side of tolerance.

Over the years the composite assessment figures for all major class I railroads in Illinois show a variance of over 100 million dollars and the assessed value of the 12 lines here involved varies in about the same proportion. The charts based on the assessment figures for these roads each show considerable variance and they vary widely from road to road. In some instances the curve of one is upward while the curve of another is downward. In comparing assessments of Class I railroads in a particular year with those of the year immediately preceding many changes are found. For example, from 1951 to 1952, 14 were increased, 4 decreased and 4 remained unchanged, with a high percent of increase for one railroad of the group of 12% and a high percent of decrease of 1%; from 1956 to 1957, 28 were increased, 4 decreased and 5 remained unchanged, with a high increase of 6% and a high decrease also of 6%. The figures for the other years between 1950 to 1957 were in about the same proportions. Thereafter to 1960, the number of decreases was pronounced. The charts, and the figures upon which they are based, refute any argument that a static level of assessment was maintained.

All parties agree that of the three indicators of value reproduction cost less depreciation has been the most un

stable, and the exhibits fully bear that out. After World War II such cost skyrocketed upward until it reached the astronomical figure of $2,162,197,000 in 1963, even after the Interstate Commerce Commission figures had been revised by the Department of Revenue by further reducing the condition percentage used by the Commission and applying the explicit adjustments for public improvements and obsolescence. This compares with a capitalized income value of $728,228,000 and market value of $877,776,000, both of which indicators had remained fairly level. If the cost factor is averaged equally with the other two (⅓ each), the relative weight of each factor to the straight average produced would be: cost 57.38%, market 23.29%, and income 19.33%. The charts of the 12 railroads involved depict the influence of the reproduction cost factor. From 1951 to 1958 the market factor line was lowest with the income factor slightly higher. The lines then crossed and the market line was slightly higher. The same is true of the average of income and market which was fairly level around the $500 million mark. The level of assessment was higher at all times except for the period from 1954 to 1957 when the income was temporarily higher. During the same years the reproduction cost line rose from about the $1 billion mark and in a relatively steady manner until it reached approximately $1½ billion. This cost factor, of course, raised the straight average of the three from just under $700 million to about $900 million before dropping back in 1958. A further comparison may be drawn from the data sheets of one of the railroads (the Burlington) for the same period. Income declined from a high of $155,355,000 in 1952 to a low of $100,595,000 in 1962, market value increased from $112,475,000 in 1951 to a high of $139,027,000 in 1958 and then steadily declined to $123,973,000 in 1962. Reproduction cost increased from a low of $219,050,000 in 1951 to a high of $336,645,000 in 1958, then receded gradually to $315,165,000.

The application of judgment or use of a judgment factor was recognized in the **North Western** case (6 Ill. 2d 278), the **Burlington** case (17 Ill. 2d 376), and **Kohorst**, and was given specific approval in **Hillison**. As was said in **Enrietta**: "A careful review of the entire record leads to the inevitable conclusion that judgment must be used by appraisers in the intricate problem of arriving at an assessed valuation of a railroad, whether it be by using various factors, then applying the judgment factor as is done in Illinois, or the choosing of a percentage for capitalizing net operating income and the fixing of the percentage weight to be given the reproduction cost factor. The Department has chosen a method to carry out the statutory mandate and has used it for many years. The method has received the tacit approval of this court in a number of cases (Cases Cited)", 29 Ill. 2d 605, 608. We are not disposed to change those views.

Nor can we say that those in the Department who were responsible for fixing railroad assessments abused their authority in the application of judgment. They certified that the resulting assessments were at full value and the Railroad Assessment Supervisor testified that to the best of his judgment they were full value assessments. This evidence is not refuted. True, the record amply discloses that a formulaic or straight average of the three factors was not followed, but that does not solve the problem. The issue is whether the final assessments were at full value based on the two explicit statutory factors and such other information as the Department considered as bearing on fair cash value.

The parties have presented an argument which is difficult to follow. The railroads charge that the courts have no power to review or determine the value of property fixed by the administrative officers in the absence of fraud, actual or constructive, and that if they invade that field there is a violation of section 1, article IX of the consti-

tution. Apparently this is based upon the fact that the Collector did not allege fraud on the part of the Department through the alleged undervaluation of railroad property. But the railroads did charge constructive fraud, and it follows that it was necessary for the court to consider whether there was a debasement of locally assessed property and similarly whether there was debasement of railroad property in order to determine whether there was discrimination and, if so, whether the degree of discrimination was so gross as to amount to constructive fraud. We do not have to pass upon the question of whether the trial court exceeded its authority in finding the exact degree of discrimination and ordering refunds based on such findings in view of the holding in this opinion.

It would also be futile to discuss whether the former cases are *res judicata* or whether the rules of collateral estoppel apply. Only a fraction of the railroads here involved were parties to the prior cases and all are parties to this consolidated proceeding which is being decided as a unit since the proof applies to all.

Much of the record in **People ex rel. Korzen v. Chicago, Burlington & Quincy Railroad Co.**, No. 38942, which involved evidence of sales of other railroads between 1947 and 1961 in an attempt to show the Department's railroad assessments to be less than full value has been introduced in this proceeding. The holding of incomparability in that case is controlling here.

In summary, the formulaic approach has never been adopted in this State and in fact has not been used. The judgment factor has been applied for a number of years and its use has been recognized and approved by this court. The record does not support the Collector's oft-repeated theory that in the use of judgment the Railroad Assessment Supervisors and the Directors abused their authority by debasing valuations in an effort to "hold the

line". We hold that the proof establishes assessments of the railroads at substantial full value and that objectors are entitled to the refunds prayed for rather than refunds fixed by the trial court, which in each case was to be computed upon the straight average formulaic result without application of the judgment factor.

The judgments of the circuit court of Madison County are reversed, and the cause is remanded with directions to order refunds in conformity with the method outlined in the **Hillison** and **Kohorst** cases and subject only to the same limitations there fixed.

Judgments reversed and causes remanded, with directions.

APPENDIX B.

In the Circuit Court of Madison County, Illinois.

STATEMENT BY TRIAL JUDGE OF REASONS FOR DECISION*

This case involves the effort of counsel and Court to dispose of tax litigation pending as long as seven years. The delay has been due to the death of one of the principal attorneys after part of the litigation had begun, to preoccupation of the County Court with other matters, to an arms length and standoffish attitude of counsel for both sides, to the lack of regular judicial statistics and administrative devices focusing on case backlogs, and to the inattention and lack of interest inherent in the non-supervised court system prior to January 1, 1964.

The review of case statistics accompanying the transition to the new court system under the Judicial Article effective in 1964 focused attention on the tax case backlog. Flexible administration possible under the new unified court permitted the assignment of one judge more or less full time to the problem. And counsel for both sides have responded with enhanced attention and interest.

Proceedings.

Tax objections of thirteen railroads were involved for tax years 1957, 1958, 1959, 1960, 1961 and 1962. The aggregate was 52 separate "cases". The multiplicity and complexity were in large part eliminated by several devices. 1) Additional parties in some of the cases were added by voluntary entry of appearance or by appearance requested by the Court and made binding after certain preliminary proceedings. 2) All of the cases thus brought

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* [Notes are at end of Statement.]

together were treated as one consolidated matter through merger and stipulation that one determination could be made on the primary issue inherent in all the cases, with this determination, modified appropriately, to take effect in regard to each individual controversy. 3) A comprehensive stipulation was made by counsel for the admission of many official documents without technical foundation. 4) The evidence of several witnesses was taken outside the county on three trips to Chicago and one to Springfield, with the trial judge accompanying counsel so that objections could be decided on the spot and return trips eliminated. 5) Hearings were expedited. 6) Full briefs and memoranda were received in a most informal way including oral and letter responses, giving counsel maximum time for presentation of views without the time-consuming effort of answers and replies.

The offerings were voluminous. There were some 150 exhibits for the Collector and 106 for the Objectors. In all, 26 witnesses testified, including those by depositions. Depositions from other cases were brought in. Documents ranging from economics and accounting to railroad operations were presented. Some of this struck the Court as unnecessary, since it involved matters of which the Court could have taken judicial notice or which it could have found in any good library.[1]

Generally all evidence which had any substantial pertinence and probative value was admitted, under the rule that a trial judge deciding a non-jury case will disregard improper evidence.[2]

From all the evidence, the Court has sought: a) some guarantee of authenticity, such as the official nature of a document, the personal observations of an occurrence witness, or the expertise of an expert giving his opinion; b) some insulation against corruption, so as to preclude speculation, hearsay, self-serving statements and other un-

reliable evidence; c) some substantial pertinence to the inquiry; and d) some probative value. These requirements led to the Court's urging counsel to select from the vast mass of evidence what counsel considered pertinent, with some statement of reliance on this.

Under the prevailing tax law the Court has indulged in the presumption that taxing authority personnel have properly performed their duties. The Court has viewed this presumption as rebuttable at both the state and local tax levels. It has also indulged in exceptions to the best evidence rule, permitting witnesses to summarize the contents of massive documents and to tabulate or epitomize these conclusions; exceptions to the hearsay rule, permitting official government document entries; and exceptions to the rule against opinions and conclusions in the case of experts.

The Objectors made broad and continuing objection to both main lines of evidence presented by the Collector, that tending to rebut the Objectors' evidence of sales assessment ratio studies showing under-assessment of local property, and also that tending to rebut the Objectors' evidence of 100 per cent assessment of railroad property by the state revenue department. Regarding local assessment, the Objectors' evidence was the more weighty, the Collector's was not dispositive, and its admission was not critical. Regarding state assessment, the Collector's evidence was more weighty and dispositive so its admission is in point.

Objection to the Collector's evidence of state assessment was on three broad grounds: 1) that the Court has no jurisdiction to inquire into the matter; 2) that the matter was closed by collateral estoppel or res judicata; and 3) that the Collector was impeaching his own party or witness. The evidence was admitted subject to motion to strike and the objection and motion were taken with

the case. For reasons detailed below, the objection was overruled, the motion to strike denied, and the evidence admitted.

First, the term "jurisdiction" as involved here is **not** used to connote **authority** to sit, **nor right** to conduct an inquiry, **nor power** to make a determination. These things are not disputed: indeed, the Objectors ask that the Court assert its power in their behalf. Rather the term "jurisdiction" here means **warrant** or **justification** or **cause** to act if the party seeking relief makes a proper case, much as the term is used in the sense that "equity has (or has not) jurisdiction" to grant relief in a proper case; in other words, simply whether there is a **cause of action**.

When with this view is coupled the idea of administrative validity, the view is reinforced. Administrative actions are presumptively valid (though the presumption is rebuttable). And, it is said, unless an administrative finding of railroad valuation by the state revenue department is actually, expressly or constructively fraudulent, there is no "jurisdiction" to review it. All this really means is that, lacking fraud, 1) the administrative finding is presumptively (though rebuttably) valid, and 2) there is no **warrant, justification** or **cause of action** to set it aside. This is what the courts have actually held, however somewhat loosely they have used the term "jurisdiction".

Given jurisdiction in the sense of the authority, right and power to act, the court may of course inquire into the validity of the administrative action (presumed or rebutted) or to any alleged constructive fraud, regarding **both** local and state administrative findings.

Second, the Objectors alleged and made an issue as part of their constructive fraud case the contention that (state railroad property assessments were at 100 per cent of full

fair cash value while other (local) property assessments were at not more than 55 per cent. On both points the Objectors offered much evidence. Now to claim that the railroad assessments are items closed by res judicata or collateral estoppel is to preempt half the inquiry and beg one of the two major questions made issues in the case.

The claim is not well based, even in inference. It lies with cases in which the railroads claimed their state assessments were excessive—more than 100 per cent.[3] But the Supreme Court in holding otherwise did not say they were not less than 100 per cent. The first such case reversed a judgment that the assessment was excessive, holding in effect that the assessment was **not more than 100 per cent.** The second discussed the factors and affirmed a trial court remandment to the department for reconsideration on the factors as clarified by the high court opinion, which said in effect that the assessment **might or might not be more than 100 per cent.** Obviously, what is not more than 100 per cent, or what might or might not be more, **could very well be less than 100 per cent.**

Wholly aside from this, it should be observed that except for rare cases, the State is never estopped.[4]

Third, regarding state assessments, the State, the People or the Collector as their agent had only one position and one approach in the evidence here—that the Objectors had not shown 100 per cent assessment of railroads. The Collector's evidence was consistent with this position. His witnesses were consistent with it. That the Objectors relied on testimony of state-employed witnesses or state-prepared documents is not material. Such evidence was admissible but not conclusive. The Collector could refute such evidence without impeaching himself or his principal or his witnesses—just as a corporation could show that its officer acted ultra vires, or a principal could show that an agent acted outside his authority.

Presumptions.

We begin with two presumptions, at two levels: a constitutional[5] presumption that all taxes are to be uniform, whether assessed at state level or at local level: and a statutory[6] presumption that all property is assessed or valued for tax purposes at its full fair cash value, again whether assessed statewide or locally.

The Collector suggests that the two presumptions may work somewhat against each other: i. e., that whereas 1) a statutory requirement of full assessment at all levels, and a frank recognition by the legislature[7] and by the revenue department and local assessors that this requirement is largely and widely ignored, calls for equalization among counties and relief here from inequities between statewide railroad assessments and lower local assessments; nevertheless, 2) a constitutional requirement of uniformity indulged by the state revenue department through adjustments of its railroad assessments to "hold the line" considering such factors as inflation and rises in reproduction costs, and commensurate with the debasing of valuations it has found at local levels, constitutes "implicit equalization" already in the figures, making further relief unnecessary and unwarranted here.[8] The Collector asserts this "implicit equalization" is achieved by the department through a gross, unwarranted, ad hoc, and even unarticulated reliance on market value (of stock and debt) and income (capitalized earnings) and an under-reliance on reproduction cost as factors in determining true value. The Collector backs his claim with an elaborate and documented historical approach, which is well taken but not alone relied on here.

The Objectors say that locally the presumption of full fair cash value assessment (100 per cent) can in any case be and has in this case been rebutted. But they say that at state level the presumption has in this case not been and could in any case not be rebutted.

Regarding local assessment, the Court must agree. Regarding state assessment the Court must differ. If the presumption is, as the Objectors say, rebuttable at local level, why not statewide? (Are state officials so much more immune from pressure, so much more competent, so much more pure than local officials? Recent indications, regarding high state officials of both major political parties, would hardly warrant such a claim.) If a rule of law applies for one litigant, why not for another in the same case? (The Collector here of course claims at state level the same rebuttability as the Objectors claim at local level.)

The law on presumptions is in accord with this reasoning. The presumption involved here—that assessing officials do their duty—is not a conclusive rule of law, but (by the Objectors' own reasoning, at local level) a presumption of fact, rebuttable. As a matter of law, it could be rebutted.[9] As a matter of fact, it has been rebutted.[10]

Nature of the Evidence.

That it is the state revenue department which finds local deviations from full assessment supports claims of debasement at local levels and makes the findings a kind of admission against the State's (hence the People's or Collector's) interest. The statutory provision for this determination of the extent of local debasement is the result of the legislature's recognition of what virtually every sophisticated observer may know already—that property assessments in Illinois are seldom if ever at full value. At local level, in this case, the fact of such debasement is not even disputed—only the extent. Such a recognition, such a lack of dispute about it at local level, should make suggestions of similar debasement at state level more acceptable, not to say more realistic and compelling.

The "admission" against State (People and Collector) interest, the admission of local assessment debasement,

carries considerably less weight as a standard admission when it is realized that the department in finding local deviations from full value is not volunteering but statute-bound[11] to seek them, and is criticizing not its own personnel but local personnel when it says they did not follow the full-value assessment requirements of the law. The department findings are not striking or even unusual, and they gain their standing to refute the presumption not as declarations harmful to the declarant and hence not to be made unless true,[12] but as part of a statutory process called for by the well recognized realities of Illinois tax assessment.

There are similar realities at the state level.[13] The department is apparently undermanned. The data is supplied by the taxpayers, not independently checked. Inspection or appraisal valuation beyond such data would be a monumental, not to say superhuman job. Lacking such valuation relegates assessment personnel to taxpayer data and to factors such as market value, income, and reproduction cost. Sales data similar to that available regarding marketed property at local levels is rarely available regarding railroads, because they are seldom sold and when sold at all are moved not in a free market but in controlled conditions. State department assessments described by department assessors as full fair cash value would not likely be described otherwise, by them—who expects a state official solemnly to certify that he did not do his duty? Far from having the reliability of an admission against interest, the assertion by a state department assessor that he or his department assessed at full fair cash value has thus instead the dubious nature of a self-serving statement. In addition, the submitted testimony from other cases probing whether state assessment was at full value was largely in the nature of conclusions, in answers to leading questions.[14]

Thus, generalizing too grossly for the subtleties involved but simply enough for clarity: 1) the evidence of full fair

cash value assessments at local level was little more than the presumption, and this was refuted by massive evidence reliable of itself and confirmed by the fact it was the product of recognition by the state legislature, the state department, and the state's local agencies that local assessment was generally less than full fair cash value (the equalization being only how much); 2) the evidence of full fair cash value at state level was little more than the presumption and the claim by the department—repeated over and over, but time and again conclusion and self serving. This was rebutted by the extensive study from the department's own figures. (Exhibits 69 and background exhibits), refuting on this basis the department witnesses' self serving conclusion. Thus, the presumption of full fair cash value assessment was rebutted at **both** local level and state level. How this was effected is shown below.

Local Assessments.

The Objectors introduced through the witness Garber voluminous evidence prepared by the Department of Revenue showing the ratio between assessments of locally assessed property and the sales price of such property. This evidence was presented in great detail, showing the procedure in the field for gathering data, the mathematical and statistical procedures and safe-guards, the means of weighting and finally the specific data for Madison County, even by townships (Objectors' Exhibits 1-14). This was all epitomized in a compilation (Objectors' Exhibit 15) showing the ratios from 1953 through 1960, the last year available, and covering four of the six years involved here. These data support a finding that local property in Madison County was assessed at about 50 per cent of its sale or market value.

Objectors' Exhibits 16 through 25, and Objectors' Exhibit 39, lend some support to these assertions.

Objectors' Exhibit 93, sub-numbers 1 through 33, are in effect more 30.1 cards for assessment sales ratios for certain Madison County property, supposedly all the property sold at above $20,000 for 1957 through 1960. These cards further buttress the showing of approximately 50 per cent tax assessment level.

Objectors' Exhibits 96, and sub-numbers, 97, 98, 99 and 100, indicate that this array includes commercial and industrial property.

Objectors' Exhibits 101 and sub-numbers, and 102 folio, further support a finding of Madison County assessments, in these cases commercial property in Collinsville, at about 50 per cent (some of them up to 60 per cent).

The Objectors' witness, Weil, after examining the sales ratio study results, testified at length and to the ultimate effect that other property in Madison County was assessed at just less than 50 per cent (May 25-26, Rec. pp. 366, 400, 445, 485; see also pages 492, 493 and 572).

The Collector presents evidence regarding local assessment of the same official character as that used by the Objectors regarding railroad assessment by the state, namely, official certifications of the Department. These would show local property assessed at approximately 60 per cent (Objectors' Exhibit 33a). This evidence has the same official authenticity, but is subject to the same limits and reservations in detail as the Objectors' exhibits of railroad assessments at state level.

The Collector also undertakes to show Madison County property is in total valuation more than 30 per cent industrial, and unique in this respect, and that Department sales ratio studies being essentially residential are not as probative as they should be. Objectors' evidence (Exhibits 96 through 100) is to the contrary, that the ratio studies did include commercial and industrial properties. At best for the Collector, this point is negative.

The Collector claims over-all a showing of local assessment at from 60 to 72 per cent of value. On the evidence, the claim is not well taken, the presumption is rebutted by the Objectors' evidence, and the greater weight of the evidence shows local assessment at about 50 per cent of full fair cash value (See especially Objectors' Exhibit 15).

State Assessments (of Railroads).

The Objectors claim that railroad property including theirs has for the period in question been assessed at 100 per cent of its value. They find some basis for this claim in official documents including annual reports of the Department of Revenue, the Department's notices of assessments, and its letters of assessment; in similar letters for prior years; in an order of this court for one railroad in 1957; in the presumption that assessing officials charged with assessing at full fair cash value actually did assess at full fair cash value; and in the testimony of witnesses Koncel, Travis and Reeves, and the deposition evidence of witnesses Danis and Chapman, plus additional depositions of Koncel and Reeves.

Collector's Exhibits 37a, 37b, 37c, 37d, 37e, and 37f are the Department's published notices of assessment of various railroads including those involved here. Objectors' Exhibit 38 and sub-numbers are the Department's certificates of assessment for the comparable years. Objectors' Exhibits 42, 43, 44, 47, 48, 59, 60, 94 and 95 (including some sub-numbers) are letters from the Department to the railroads or related items regarding the assessments published in the official publications. These documents use the phrases "original full assessed valuation", "full assessed valuation", "final assessment", and "full valuation State assessed." They use these phrases in connection with the figures given for the respective railroads for the respective years. They do not give detail nor any item basis for the result, but they are the deter-

mination of the Department, which may be called an opinion, conclusion, or finding. The inference claimed is that in each case the figure is 100 per cent of value.

Annual reports of the Department and its predecessor body the Tax Commission (Collector's Exhibits 1 through 39) give some background on the State assessment process.

Objectors' Exhibit 46, the order of this court (before unification under the Judicial Article called the County Court) uses the phrase "full fair cash value" for one railroad for one year.

The witness Koncel, the revenue department assessor, testified (July 20, Rec. 2593, 2610, 2611) that the Department found "full fair cash value" for all railroads. The same phrase is used in Objectors' Exhibit 71 (pp. 10-11), Objectors' Exhibit 72 (p. 16), Objectors' Exhibit 73 (pp. 9, 10), and Objectors' Exhibit 74 (pp. 8, 9, 22), which are depositions of the same witness taken in other proceedings in Sangamon, Kankakee, Montgomery and Lawrence Counties. The witnesses Danis, Travis, Chapman and Reeves used similar phrases, likewise in conclusion-type testimony.

This evidence, in the view of the Court, is a massive accumulation of conclusions.

"It is the duty of the Department of Revenue to assess all railroad property, other than non-carrier real estate, at its fair cash value" (Ill. Rev. Stats. 1957, ch. 120, § 561). "(T)here is a presumption of statutory compliance" with this duty, in a case **where "there is no evidence** in the record to overcome the presumption and proof . . .", such as the Kohorst case.[16]

What about the case where there is evidence to overcome the presumption and proof? That is the case here.

The presumption incorporated in the Kohorst case that Department personnel complied with the statutes and

therefore assessed at 100 per cent of full fair cash market value was applied in that case because 1) it was backed by proof and 2) there was no evidence to rebut the presumption. In this case, however, the proof is weak, and there is evidence—evidence which not only rebuts the presumption (which falls upon the presentation of evidence),[17] but stands on its own basis.

The Collector here, instead of showing Department determinations (opinions, conclusions or findings) and undertaking to justify, sustain or rationalize this by mere reference to some detail, went the other way. The Collector started with the detail, applied and explained a mathematical process, and built the result. It used the same original data as that available to the Objectors, the assessment data sheets of the Department for the years 1951 through 1962 (Collector's Exhibit 60).

Like the Objectors' evidence, these data sheets also fell short of providing item information on property items; but this evidence did break down the valuation process and show its component parts and procedural steps to the greatest extent of any evidence in the case—and, considering the vast potential of any other detail for even one railroad for one year, perhaps this was the greatest extent of detail possible. Working from this detail, the witness Cohen constructed charts (Collector's Exhibit 69) showing that the railroad assessments for the six years involved here were much less than 100 per cent of full fair cash value—taking this to be an average of cost, income and market factors.

The use of the three factors, and the application of equal weight to each of them in a straight average formula, the witness Cohen called not only justifiable but essential. He further indicated that any judgment applied to the formula should be articulated in precise figures, since figures were the end result and anything not articulated in figures was likely to be arbitrary.

The witness Stiles indicated this was the approach before 1948,[18] and the witness Hulman indicated this is now more or less the approach.[19]

Another approach to railroad valuation starting from detail was a sales ratio study submitted by the witness Cohen, again utilizing official figures for all the railroad sales transactions he considered bona fide. Railroads are not frequently sold and these amounted to only ten transactions since 1948, six of these since 1957. They are shown on Collector's Exhibit 104 (Six other transactions he did not include are shown by Objectors' Exhibit 89).

The witness Cohen concluded from his valuation assessment sheets (his first approach) that while cost figures had been going up, railroad assessments had remained relatively stable for the years since World War II, particularly since 1957, and had actually declined in 1961 and 1962 (Collector's Exhibit 59).

On the second approach, the sales ratio studies, he found assessments at a weighted average of 72 per cent of market value.

Ideally, market value can be best proved by a substantial number of bona fide sales transactions. Railroads, however, are seldom sold. And when sold, they are sold not exactly in a free open market, but in the controlled circumstances of a limited monopoly supervised by government agencies, assuring a certain range of fiscal consequences. For railroads, therefore, the market figure is often taken to be the value of their stock and debt. And this figure is used as a valuation item. Another factor used is capitalized income.

Such factors are seldom if ever, used for assessing other property. Ordinary taxpayers' property may be taxed at full market value based upon cost (a sale item) though it may never have any income producing value and though

ownership equity (stock and debt) is not even ascertainable.

The result of this disparity may be that a property tax law is substantially mitigated in favor of the railroad tax payer by use of the income and market factors.

Such an analysis may not call for relationship of the income and market factors, but it does tend to warrant the ⅓ - ⅓ - ⅓ straight average as stressed by the witness, Cohen.

The Court is of the view that the Objectors' evidence of railroad property State assessed was in large part conclusions and presumptions, while the Collector's evidence was in substantial detail utilizing the pointed results from specified data, overcoming the presumption of full assessment as it was not overcome in the Kohorst case, but as that case left open the possibility of its being overcome.[20]

Burden of Proof—Extent Sustained.

The Objectors alleged for the tax years here involved that railroad (state) assessment was at 100 per cent of full fair cash value, and that local assessment was at not more than 55 per cent of full fair cash value, a disparity of at least 45 per cent, amounting to a gross discrimination or constructive fraud on the Objectors.

The Objectors had the burden of proving this allegation, either in full as to both state and local assessments, or in substantial part by showing some precise level of state assessment and some precise level of local assessment, with the state level so much above the local level as to be a gross discrimination or constructive fraud,[21] which burden must be sustained by clear and convincing proof.

The Objectors succeeded in showing local assessments at not more than 55 per cent, namely, for the 52 cases,

local assessments ranging from 48.14 per cent of full fair cash value to 51.40 per cent. (Esp. Objectors' Exhibit 15.) In other words, they sustained their burden of proof in full at local assessment.

At state railroad assessment they did not (except in six minor cases) succeed in full, but only in part, in sustaining their burden of proof. The claim of 100 per cent assessment of railroad property by the state was not proved by clear and convincing proof, or even by the greater weight of the evidence. The claim lay in the conclusions, self-serving statements, and answers given to leading questions heretofore discussed. Short of the categorical claim of 100 per cent, the Objectors showed no precise level of state assessment. The Collector did. And the Collector's figures were those supported by the credible evidence, and by the greater weight of the evidence—the only state assessment evidence on which the Court could hang its belief and reliance. (See especially Collector's Exhibit 69.)

In six minor cases, where the Collector's rebutting proof was lacking, and the Objectors could stand more securely on the presumption thus unrebutted, the Objectors sustained their burden of proving 100 per cent state assessment of railroads, and thus were entitled to relief as fully as claimed. In the other cases, the Collector's rebutting proof was entitled to the greater weight and the Objectors only partly sustained their burden, the net reliable proof showing state assessments ranging from as high as 85 per cent of full fair cash value to as low as 58 per cent. (See Schedule.) These proofs can be most conveniently shown on a table, including for each railroad tax year the precise percentage of full fair cash value addressed by local assessors against local property, the percentage assessed by state assessors against railroad property, the difference, and the percentage disparity. Such a schedule is essential as a basis for the determination of tax refunds in each case under the Hillison case.

The schedule, in table form as computed by the Court, follows:

Schedule of Assessment Levels

		a	b	c	c/a %
		Railroad (State)	Local	Difference	Disparity
C. B. & Q.	1957	75.30	48.14	27.16	36.06
	1958	71.60	51.40	20.20	28.21
	1959	72.70	49.96	22.74	31.31
	1960	73.00	49.78	23.22	31.80
	1961	77.00	50.00	27.00	35.06
	1962	76.00	50.00	26.00	34.21
C. & N.	1957				*
	1958	70.70	51.40	19.30	27.29
	1959	67.80	49.96	17.84	26.31
	1960	63.00	49.78	13.22	20.98
	1961	65.00	50.00	15.00	23.07
	1962	61.00	50.00	11.00	18.03
I. C.	1957				*
	1958				*
	1959	68.00	49.96	18.04	25.52
	1960	67.00	49.78	17.22	25.70
	1961	69.00	50.00	19.00	27.53
	1962	70.00	50.00	20.00	28.57
N. Y. C.	1957	72.00	48.14	23.86	33.13
(C. C. C. & St. L.)	1958	69.50	51.40	18.15	26.11
	1959	70.00	49.96	20.04	28.62
	1960	71.00	49.78	21.22	29.88
	1961	75.00	50.00	25.00	33.33
	1962	81.00	50.00	31.00	38.27
Pa.	1957				*
	1958				*
	1959				*
	1960				*
	1961	71.00	50.00	21.00	29.57
	1962	72.00	50.00	22.00	30.55
G. M. & O.	1957				*
	1958	67.20	51.40	15.80	23.51
	1959	72.00	49.96	22.04	30.61
	1960	72.00	49.78	22.22	30.86
	1961	74.00	50.00	24.00	32.43
	1962	74.00	50.00	24.00	32.43

* Valuation objection for this railroad for this tax year was not filed, or has been settled, or in any event is not at issue.

Schedule of Assessment Levels

		a	b	c	c/a
		Railroad (State)	Local	Difference	% Disparity
Wabash	1957				*
	1958				*
	1959				*
	1960				*
	1961	64.00	50.00	14.00	21.87
	1962	67.00	50.00	17.00	25.33
C. & E. I.	1957	60.00	48.14	11.86	19.76
	1958	58.00	51.40	6.60	11.37
	1959	62.30	49.96	12.34	19.80
	1960	60.00	49.78	10.22	17.03
	1961	61.00	50.00	11.00	18.03
	1962	64.00	50.00	14.00	21.87
N. Y. Ch. & St. L.	1957				*
	1958				*
	1959	71.00	49.96	21.04	29.63
	1960	71.00	49.78	21.22	29.88
	1961	72.00	50.00	22.00	30.55
	1962	70.00	50.00	20.00	28.57
Terminal of St. L.	1957				*
	1958				*
	1959				*
	1960				*
	1961	81.00	50.00	31.00	38.27
	1962	82.00	50.00	32.00	39.02
Ill. Term.	1957				*
	1958				*
	1959				*
	1960				*
	1961	77.00	50.00	27.00	35.06
	1962	85.00	50.00	35.00	41.17
Alt. & So.	1957				*
	1958				*
	1959				*
	1960				*
	1961	77.00	50.00	27.00	35.06
	1962	77.00	50.00	27.00	35.06

* Valuation objection for this railroad for this tax year was not filed, or has been settled, or in any event is not at issue.

Schedule of Assessment Levels

		a	b	c	c/a %
		Railroad (State)	Local	Difference	Disparity
Mo-Ill. B&B	1957	100.00	48.14	51.86	51.86
	1958	100.00	51.40	48.60	48.60
	1959	100.00	49.96	50.04	50.04
	1960	100.00	49.78	50.22	50.22
	1961	100.00	50.00	50.00	50.00
	1962	100.00	50.00	50.00	50.00

* Valuation objection for this railroad for this tax year was not filed, or has been settled, or in any event is not at issue.

The Objectors claim these determinations constitute "findings" which cannot be substituted by the Court for the administrative findings of the assessing bodies. This claim is not well taken. On the contrary, the findings made by the assessing authorities and the determinations made here by the Court are not even of the same nature. The assessing authorities of the state regarding railroads and of the local taxing authorities regarding other property made findings in dollar figures of the value of property assessed. The Court here does not even deal in dollars, but in percentages. It makes no findings at all. It determines only whether the assessing authorities were right, that is, at 100 per cent of value (as claimed locally by the Collector and as claimed statewide by the Objectors) in the findings that the assessing authorities made—and if they were not right, then to what extent they were wrong, that is, to what extent they fell short of 100 per cent. The Court determined that the findings of neither the local nor the state assessors were 100 per cent value findings, and the foregoing schedule shows the extent to which their findings as shown by the evidence fell short of being 100 per cent value findings. This kind of determination is of course the very determination the Objectors asked the Court to make. To call such a determination "findings" and thus say now that the Court could not make it is to quarrel not with the Court's authority or procedure but with the result:

Judgments in accord with these views were duly entered, utilizing the figures from the schedule of assessment levels, inserting appropriate figures in each of the 52 cases consolidated for trial. Since it could not be concluded that either side had "won"—the railroads having received very substantial but by no means total relief—the Court prepared its own judgment order. This included a provision for refund in accord with the Hillison case guide. (A copy of this judgment order is appended.) No other "conclusion" for this statement need be made.

Pursuant to Supreme Court Rule 36c this statement is included in the report of proceedings at the trial, with copies for the convenience of counsel and the Court on appeal.

James O. Monroe, Jr., /s/
Circuit Judge.

NOTES.

* Deciding this case is so largely a matter of evidence rather than law, and the principles of evidence involved are so elementary, that the customary citations of authority would unduly encumber this statement and are avoided except as noted. There is appended for the information of the Court on appeal a list of authorities briefed by the court here and studied and considered as requested by both sides.

[1] Such material may become a critical basis for decision. See the use of non-legal writing in Brown v. Board, 347 U. S. 483, 494, note 11 (1954), perhaps the most momentous case of our times.

[2] Cleary, Illinois Evidence (2nd ed.), sec. 7.6; Knight v. Collings, 227 Ill. 348, 353 (1907), action at law; Oswald v. Nehls, 233 Ill. 438, 444 (1908), suit in chancery.

[3] The position is stated at Rec. pp. 691-701, 962-965, and 973-975. The two principal cases are C. & N. W. Ry. Co. v. Dept., 6 Ill. 2d 278 (1955), and C. B. & Q. R. R. Co. v. Dept., 17 Ill. 2d 376 (1959). Peo. ex rel. Enrietta v. G. M. & O. Rd. Co., 29 Ill. 2d 605 (1963), involves the same point indirectly.

[4] Todd v. Annunzio, 410 Ill. 343, 348 (1951); Hughes v. Ill Publ. Aid. Comm., 2 Ill. 2d 374 (1954); I. L. P., Estoppel, sec. 33, esp. notes 84-90, incl.

[5] Constitution of Illinois, Art. IX, sec. 1; I. L. P., Revenue, secs. 15 et seq.

[6] Ill. Rev. Stats. 1963, secs. 501, 560, 561, 611, and 627-632 incl. (Revenue Act of 1939, secs. 20, 79, 80, 130, and 146-151 incl.).

[7] Ill. Rev. Stats. 1963, secs. 627-632 incl. (Revenue Act of 1939, secs. 146-151 incl.).

[8] See testimony of Weil, Rec. pp. 472 et seq., and of Cohen, Rec. pp. 948-958, 1508, 1509, 1515, 1530, 1567, 1568, 1573, 1638, 1650-1655, 1716.

[9] Cleary, Illinois Evidence (2nd ed.), secs. 4.11 through 4.16, esp. secs. 4.14 and 4.15; and Wigmore, Evidence (3rd ed.), secs. 2490-2493.

[10] See esp. Collector's Exhibit 69 and background exhibits.

[11] Ill. Rev. Stats. 1963, secs. 627-632, incl.

[12] Cleary, Illinois Evidence (2nd ed.), sec. 17.11.

[13] See, e. g., testimony of Koncel, Rec. pp. 2545 (volume of work), 2576-2580 (arbitrary assessment reductions), and 2619-2622 (range of variance in assessments). He said that there was no specific weight assigned to a cost indicator in applying the judgment factor (Rec. p. 2592). He said there was a "tolerance between railroad assessors in taking the same figures and arriving at a result," a tolerance of 15 per cent; and that if he brought in different assessors to do his job in 1961 and 1962 they might have reached figures that were 15 per cent different (Rec. p. 2619). This 15 per cent "could be either way . . . up or down . . . from the figure determined (by him) in 1961 and 1962" (Rec. pp. 2621, 2622).

[14] See Koncel depositions, Objectors' Exhibits 71 (Ex. pp. 10, 11), 72 (Ex. p. 16), 73 (Ex. pp. 9, 10), and 74 (Ex. pp. 8, 9, 22). See also Danis deposition, Objectors' Exhibit 76 (Ex. pp. 9, 18, 20).

[15] Reference is to Exhibit pages, not Record pages.

[16] 22 Ill. 2d 104, 109 (1961).

[17] Cleary, Illinois Evidence (2nd ed.), secs. 4.14 and 4.15.

[18] Rec. pp. 2283 et seq.

[19] Rec. pp. 1069 et seq.

[20] 22 Ill. 2d 104, 109 (1961). Peo. ex rel. Hillison v. C. B. & Q. R. R. Co., 22 Ill. 2d 88, 102 (1961), is to the same effect, decided on the basis that there was "no evidence in the record to overcome the presumption" (102), but likewise clearly implying a different result if there is such evidence.

[21] Kohorst, supra, 109.

REFERENCES. [a]

[a] Omitted here. Set forth at pp. 27-30 of People's Additional Abstract, Vol. I "Illinois Supreme Court Record", p. .....

Form of Judgment Order.

In the Circuit Court,
Third Judicial Circuit,
Madison County, Illinois.

People of the State of Illinois, ex rel. Treasurer and ex-officio Collector of Madison County, Illinois (now George Musso, heretofore James T. Callahan and Dan McGee), Applicant-Plaintiff, v. .... Objector-Defendant.	Application for Judgment for Taxes, with Tax Objections. Tax Year ..... Former County Court Case No. ..... Consolidated Herein With Other Cases

FINAL ORDER ON VALUATION OBJECTION AND CLAIM OF DISCRIMINATORY ASSESSMENT.

The Application of the People of the State of Illinois, on the relation of and through the Treasurer and Ex-Officio Collector of Madison County, Illinois, for judgment for taxes against the Objector, and the valuation objection of the Objector to its taxes and to such a judgment, having come on for hearing and having been presented, heard, and argued, and having been considered by the Court, the Court now enters its order, stating, reciting, finding or adjudging as follows:

Proceedings.

1. The Applicant for judgment and Plaintiff is the People of the State of Illinois, on the relation of and through the Treasurer and ex-officio Collector of Madison County, Illinois, who now is George Musso, and who, as his pred

cessor in office, from December 1954 to December 1958 was James T. Callahan, and from December 1958 to December 1962 was Dan McGee; and he or they may be hereinafter called the Collector, Applicant, Plaintiff or People.

2. The Objector and Defendant is .....

.....

a corporation; and it may be hereinafter called the Objector or Defendant.

3. The tax year is the Objector's tax year .....

4. The Objector has duly paid its taxes for this year, but has made such payment in part under protest, and in this regard has filed its objection, objecting to such taxes and to any judgment against it for such protested taxes, and claiming a refund of such protested taxes paid.

5. By proper proceedings duly shown of record, this case has been consolidated for hearing with other cases, involving this Objector for other tax years, and involving other Objectors for this or other tax years; and in so far as they may be applicable to this case, any or all of the things presented in any or all of the consolidated cases have been considered as applicable in and to this case.

6. In this case or in the consolidated cases, there have been:

a. Certain pleadings and papers filed by the Collector, and certain pleadings and papers filed by the Objector.

b. Judicial notice taken by the Court of the files and dockets in these cases.

c. Stipulations entered into between and among the parties, regarding proceedings, records, exhibits, and evidence, including records of the County Clerk, the County Treasurer, the Board of Review, and the Recorder of

Madison County, Illinois, the Department of Revenue of the State of Illinois, the Illinois Commerce Commission, and the Interstate Commerce Commission, made subject to consideration in this case to the extent that any party placed reliance on such records and noted such reliance for the Court's attention, and with appropriate provision for excerpting the parts thereof relied on for the record before this Court.

d. Evidence, including testimony heard in court hearings and evidence depositions duly transcribed and presented in court, together with exhibits presented in hearings or depositions and duly admitted, including record exhibits hereinabove mentioned.

e. Presentations of law, through briefs, memoranda, letters, and oral assertion.

f. Argument, duly made orally and in writing, from time to time and in conclusion.

g. Form of orders, proposed and suggested orally and in writing.

h. Computations for proposed and suggested refunds or judgments, made orally and in writing, claimed by the respective parties in substance and adaptable regarding foram in any event.

And all such matters are taken as properly before the Court, and objections to them are taken as waived, all unless and except to the extent otherwise noted.

7. The Court has jurisdiction of the subject matter and the parties, in regard to the application for judgment and to the objections and to all matters pertinent to them.

Recitals or "Findings"

8. The Collector's application for judgment was made in apt time and in proper form, and formal proof thereof

is taken as made, without objection, or with objection waived.

9. The Objector's objection to taxes and to judgment was made in apt time and in proper form, and formal proof thereof is taken as made, without objection, or with objection waived.

10. The issue here involves the Objector's objection, or that part of it, relating to the assessed valuation of the Objector's property, rather than to the legality of any tax rates, which rates to the extent of their validity may however hereafter be considered in computing any refund or judgment to be made after decision of the valuation matters at issue here.

11. The State of Illinois, through its Department of Revenue, pursuant to statute, assessed the Objector's railroad property (except non-carrier real estate, locally assessed) as a unit, state-wide, including its railroad property in Madison County, at what purported to be its fair cash value; which the Objector claims was in effect its full fair cash value (100%), and which the Collector claims was not.

12. The State of Illinois and County of Madison, through proper local assessing authorities and the Department of Revenue, pursuant to statute, assessed and through a duly determined multiplier equalized other property in Madison County at what purported to be its fair cash value; which the Collector claims was in effect its full fair cash value (100%), and which the Objector claims was not.

13. Both the Collector and the Objector presented evidence regarding the levels of assessment of railroad property state assessed and of locally assessed property, which evidence is before the Court to be considered by it, regardless of what party produced it.

14. The Objector alleges for the tax year here involved that its railroad (state) assessment was at 100 per cent of full fair cash value, and that local assessment was at not more than 55 per cent of full fair cash value, a disparity of at least 45 per cent, amounting to a gross discrimination or constructive fraud on the Objector.

15. The Objector has the burden of proving this allegation, either in full as to both state and local assessments, or in substantial part by showing some precise level of state assessment and some precise level of local assessment, with the state level so much above the local level as to be a gross discrimination or constructive fraud, which burden must be sustained by clear and convincing proof.

16, This case is here on the merits, on the issue of whether or not the Objector's burden of proof has been sustained, and if so to what extent.

17. This Court having general jurisdiction to enter judgments at law and to prevent or provide remedies against fraud, and having been asked by the Collector, through its application for judgment, and by the Objector, through its objection, to take jurisdiction of the application and objection and the issue thereunder, does take and exercise its jurisdiction to determine whether the Collector is entitled to judgment and if so for how much, and to determine whether the Objector has suffered any discrimination or fraud and if so to what extent and whether it is entitled to any refund of taxes paid and if so how much.

18. The Objector has sustained the burden of proof to the extent that there is shown in the evidence, and by the greater weight of the evidence, the following levels of assessment for the tax year mentioned:

Level of Assessment.

Objector's state-assessed railroad property, including that portion in Madison County	.....%	(a)[1]
Locally assessed property in Madison County	.....%	(b)[2]
Arithmetical Difference (a — b)	.....	(c)[3]
Percentage Disparity (c ÷ a)	.....%	

[1] See especially Collector's Folio Exhibit 60 summarized in Collector's Exhibit 69, Collector's Exhibit 104, and testimony of the witness Cohen.

[2] See especially Objector's Folio Exhibit 14 summarized in Objector's Exhibit 15, and testimony of the witness Weil.

[3] Computation of any refunds rising from this difference or disparity must be in accord with Peo. ex rel. Hillison v. C. B. & Q. R. R. Co., 22 Ill. 2d 88, 102-103. The amount of refund may vary among various taxing districts in accord with the ratio of railroad property to total property in the district. And the over-all amount of refund may of course vary from the initial arithmetical difference or percentage disparity shown above.

and this disparity was so great as to constitute a gross discrimination against the Objector; but beyond this extent and otherwise, the Objector has failed to sustain the burden of proof

19. No actual fraud on the Objector was intended by either state or local assessment authorities and none is claimed or proved; nevertheless, the foregoing disparity in assessment was so great as to be in part constructively fraudulent and to warrant in part the relief claimed by the Objector.

20. By reason of the disparity in assessments shown, and to the extent thereof, but to that extent only, the Objector has been damaged, the Objector's objections should be sustained, judgment should be denied, and the Objector should have a refund.

21. The measure of the Objector's damage and refund should be the difference between its taxes for the year

mentioned and the amount its taxes for that year would have been had all the property in the County been assessed at full cash value.*

22. The amount of any such refund should be determined only after consideration of the amount of any other refunds (including refunds for objections regarding rates) heretofore made or determined to be made, with any appropriate offset or reduction so as to preclude any double recovery; and such refund should in any case not exceed the amount of those taxes paid which were paid under protest.

23. In all other respects on this issue, and beyond the extent indicated, the Objector has not been damaged, the Objector's objections should be denied, judgment should be granted, and the Objector's taxes paid should be retained by the Collector and distributed by him to the taxing districts concerned.

Decision and Judgment.

It is therefore considered, ordered, adjudged, and decreed as follows:

I. To the extent indicated and the damage and refund due, the Objector's objections are sustained, the Collector's application for judgment is denied, and the Collector is ordered to refund to the Objector the amount due the Objector.

II. The measure of this damage and refund is the difference between the Objector's taxes for the year mentioned and the amount its taxes for that year would have been had all property in the County been assessed at full fair cash value.

III. The damage and refund due shall be determined only after consideration of the amount of any other re-

* See Hillison, 102-103.

funds (including refunds for rate objections) heretofore made or determined to be made, with any appropriate offset or reduction so as to preclude any double recovery: and such refund shall not exceed the amount of those taxes paid which were paid under protest.

IV. Beyond this extent of damage and refund indicated, and otherwise and to all other extent, the Objector's objections are overruled, the Collector's application for judgment is granted, and the Court hereby enters judgment for the Collector and against the Objector, and the Collector is ordered to retain for distribution to the taxing districts concerned the remaining balance of all such taxes extended or paid by the Objector (together with any amount to be retained by reason of offset or limitation).

V. The amount to be refunded to the Objector and the amount to be retained by the Collector and the distribution by him to the various taxing bodies or districts, shall be hereafter computed by representatives of the Collector and of the Objector, with such computation to be submitted, mutually checked, verified, and then approved by this court.

VI. The Court retains jurisdiction of this cause for the purpose of approving or correcting such computation and implementing the process of refund, retention and distribution of the tax moneys involved.

VII. The finality of this order, judgment and decree shall not be affected by any delay in the ultimate computation of the dollar amounts to be refunded, retained, or distributed.

VIII. There is no just reason for delaying the enforcement or appeal of this order, judgment and decree.

Enter this ..... day of August, 1964.

.....

Circuit Judge.

APPENDIX C.

Prototype of the Forty-Six Judgments Entered by the Supreme Court of Illinois.[a]

And now, on this day [June 24, 1965], this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises, are of the opinion that in the record and proceedings aforesaid, and in the rendition of the judgment aforesaid, there is manifest error.

Therefore, it is considered by the Court that the error and others in the record and proceedings aforesaid the judgment of the Circuit Court of Madison County in this behalf rendered, Be Reversed, Annulled, Set Aside and Wholly for Nothing Esteemed, and this cause be remanded to the Circuit Court of Madison County with directions to order a refund in conformity with the method outlined in the **Hillison** and **Kohorst** cases and subject only to the same limitations there fixed.

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[a] 11 Ill. Sup. Ct. Rec. 172-217.

APPENDIX D.

From the Illinois Revenue Act of 1939 as Amended.*

I. Statutory Duty of Director of Revenue to Equalize Local Assessments.

A. Prior to January 1, 1946.

"The Department **may** so lower or raise the total assessed value in any county as returned by the County Clerk as shall make the property in such county bear a **just relation** to the assessed value of property in other counties. . . ." Ill. Rev. Stat. 1943, Ch. 120, § 623 (emphasis added).

B. January 1, 1946-July 22, 1959.

". . . The Department **shall** lower or **raise the total assessed value of property in any county as returned by the County Clerk so that such property will be assessed at its full, fair cash value.** . . . By means of a comparison of assessed valuations as revised by boards of review or boards of appeals, as the case may be, and estimated full, fair cash values established through the analysis of property transfers, property appraisals, and such other means as it deems proper, and reasonable the Department shall annually ascertain and determine the percentage relationship for each county of the State, between the valuations at which locally assessed property is listed by assessors and revised by boards of review or boards of appeals, as

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* The statutory assessment standard in Illinois has been full (100%) value since 1927 with regard to both locally assessed and state assessed property. See People's Second Brief, pp. 1-2B, 11 Ill. Sup. Ct. Rec. 88. Statutory provisions concerning local assessors are in Ill. Rev. Stat., 1965, Ch. 120, §§ 501, 502, 483-497. § 498 explicitly divides assessment duties between local assessors and the Department of Revenue on the basis of type of property.

the case may be, and the estimated full, fair cash value of such property . . . with the ratio so ascertained . . . for each county, **the Department shall** then ascertain the amount to be added to or deducted from the aggregate reviewed assessment on property subject to local assessment jurisdiction in **order to produce a ratio of assessed to full, fair cash value equivalent to one hundred per cent.**" Ill. Rev. Stat. 1945, Ch. 120, § 627 (emphasis added).

C. **July 22, 1959-August 2, 1965.**

". . . The Department **shall** lower or raise the total assessed value of property in any county or assessment district in a county having 500,000 or more inhabitants as returned by the County Clerk so that such property will be **assessed at its full, fair cash value** in any year in which a quadrennial assessment is made in such county or in an assessment district in a county having 500,000 or more inhabitants. **The equalization factor thus determined shall be used in like manner in each of the three succeeding years.** . . ." Ill. Rev. Stat. 1961, Ch. 120, § 627 (emphasis added).

II. **Statutory Duty of Director of Revenue to Assess Railroad Property.**

Standard of Assessment.

"The Department shall assess all property **owned** or **used** by railroad companies **operating** within this State as of April first annually, except property found by the Department to be non-carrier real estate . . . The Department **shall,** in determining **the fair cash value** of the property assessed by it, **value all the property of any railroad company as a unit,** but shall make due allowance for any non-carrier real estate. For the purpose of determining the fair cash value of the property of any railroad company the Department shall take into consideration the

actual or market value of the shares of stock outstanding, the actual or market value of all bonds outstanding and all other indebtedness or shall be applicable, for operating the road, provided, in determining the market value of any such stock or indebtedness, the Department shall consider quotations for the next preceding five years; the net earnings of the company during the five calendar years preceding the assessment date; **and such other information as the Department may consider as bearing on the fair cash value of the property of a railroad company. . . .**" Ill. Rev. Stat. 1937, 1963, Ch. 120, § 563 (emphasis added).

Property to Be Assessed.

"The term 'operating property' shall mean and include all tracks right of way, all structures and improvements on such right of way, all rights and franchises, all rolling stock and car equipment, and all other property, real or personal, tangible or intangible connected with or used in the operation of the railroad including real estate contiguous to railroad right of way or station grounds held for reasonable expansion or future development." Ill. Rev. Stat., 1937-1963, Ch. 120, § 560.

Legislative Direction on Cost Data.

"Each year every railroad company in this State shall return to the Department, in addition to any other information required by this Act, sworn statements or schedules as follows: . . . (8) The reproduction cost of the property within Illinois and the total reproduction cost of all property of such company. Said reproduction cost, so far as applicable, shall be last determined by the United States Interstate Commerce Commission, or other competent authority, plus additions and betterments and depreciation to the December 31, next preceding the assessment." Ill. Rev. Stat., 1937-1963, Ch. 120, § 563.

Interstate Allocation.

"If any railroad company owns or uses operating property partly within and partly without this State, the commission **shall determine the value of the entire operating property of such railroad** but shall take only that part of such entire value as is represented by the average percentage of (a) the length of all track including main, second and additional main track, side track and turnouts within this State, (b) its gross revenues arising from railroad operations in this State, (c) the reproduction cost of its operating property within this State, as determined by the Interstate Commerce Commission of the United States, or other competent authority, plus additions and betterments, less retirements and depreciation. Provided nothing in this section shall be construed to preclude the use or substitution of such other factors or methods as may appear reasonable and necessary in determining for any railroad the proportion of its operating property or any part thereof within this State. Ill. Rev. Stat., 1937-1963, Ch. 120, § 565.

Distribution of Railroad Assessments (1937-1963).

"The full fair cash value of the operating property and non-operating personalty of every railroad company subject to assessment shall be listed and taxed in the several taxing districts in the proportion that the length of all the track owned or used in such taxing district bears to the whole length of all the track owned or used in this state, except the value of all station houses, depots, machine shops or other buildings of an original cost exceed $1,000 which shall be deemed to have a situs in the taxing district in which the same are located. **The Department shall equalize** and distribute **the full, fair cash value of the property of every railroad company** (other than non-carrier real estate) to the respective taxing districts entitled thereto and shall certify the same to the county

clerks of the respective counties who shall extend taxes against such values the same as against other property in such taxing districts. Ill. Rev. Stat., 1937-1963, Ch. 120, § 567 (emphasis added).

1963 Equalization Amendment (1963).

". . . The Department shall determine the equalized assessed value of the property of every railroad company, other than non-carrier real estate, by applying to its determination of the fair cash value of such property of every railroad company an equalization factor which factor shall be the statewide average ratio of the equalized assessed value of locally assessed property to the full, fair cash value of such locally assessed property." Ill. Rev. Stat., 1965, Ch. 120, § 561 (August 26, 1963).

"The equalized assessed value of the operating property . . . when determined as prescribed in Section 80 of this Act shall be listed and taxed in the several taxing districts. . . ." Ill. Rev. Stat., 1965, Ch. 120, § 567.

APPENDIX E.

Data Proving the Trial Court's Interpretation of "Judgment Factor" Reductions as an Arbitrary Technique to Eliminate Inflation From State Assessments of Railroad Property in Illinois, 1946-1962.

	1946[a]	1947	1948[b]	1949[c]	1950[d]	1951	1952	1953	1954	1955	1956	1957	1958	1959[e]	1960[f]	1961[g]	1962[h]
Total Assessment by Director of Revenue of Railroad Property	1,083,746,500	1,077,466,000	1,078,971,000	1,084,196,000	1,075,583,000	1,084,964,000	1,088,193,000	1,096,730,000	1,090,815,000	1,095,390,000	1,098,034,000	1,107,298,000	1,090,335,000	1,055,262,000	1,052,378,000	1,000,305,000	998,388,000
Chicago, Burlington and Quincy[i]																	
Capitalized Income[j]						152,112,000	155,355,000	153,242,000	149,811,000	154,871,000	150,943,000	151,728,000	142,332,000	130,138,000	121,803,000	109,585,000	100,595,000
Stock and Debt	(Data for Years Prior to 1951 Could Not Be Located by Director in 1963)					112,475,000	114,932,000	116,242,000	120,167,000	121,844,000	128,912,000	135,519,000	139,027,000	133,578,000	132,428,000	127,424,000	122,973,000
RCNLD Adjusted[j]						219,060,000	243,517,000	248,603,000	245,050,000	276,975,000	280,480,000	298,303,000	334,100,000	328,093,000	334,150,000	311,900,000	315,165,000
Formulaic Average						161,212,000	171,370,000	172,697,000	171,676,000	184,563,000	186,778,000	195,183,000	205,153,000	197,270,000	192,794,000	182,936,000	179,911,000
Less "Judgment Factor"[k]						20,157,000	30,130,000	29,547,000	28,476,000	41,377,000	42,178,000	47,983,000	58,153,000	53,770,000	51,794,000	42,486,000	41,961,000
ASSESSMENT	133,900,000	133,900,000	140,000,000	141,000,000	140,000,000	142,809,000*	143,500,000*	144,600,000*	144,600,000*	144,600,000*	144,600,000*	147,000,000*	147,000,000	143,500,000	141,000,000	140,450,000	137,950,000
Chicago & Northwestern[l]																	
Capitalized Income[j]						39,568,000	35,732,000	36,194,000	34,827,000	33,322,000	32,119,000	21,727,000	22,250,000	23,719,000	25,234,000	23,290,000	21,486,000
Stock and Debt	(Data for Years Prior to 1951 Could Not Be Located by Director in 1963)					41,289,000	41,655,000	43,996,000	49,198,000	52,722,000	56,132,000	65,546,000	68,178,000	73,232,000	73,256,000	63,494,000	63,215,000
RCNLD Adjusted[j]						192,820,000	200,545,000	213,000,000	193,083,000	205,720,000	200,882,000	215,922,000	236,145,000	235,984,000	247,975,000	259,292,000	249,956,000
Formulaic Average						91,225,000	92,644,000	97,730,000	92,370,000	97,255,000	96,378,000	101,065,000	108,847,000	110,642,000	115,850,000	115,592,000	114,786,000
Less "Judgment Factor"[k]						2,225,000	4,894,000	10,980,000	7,870,000	15,805,000	15,408,000	24,565,000	31,847,000	35,642,000	42,850,000	49,092,000	43,786,000
ASSESSMENT	90,000,000	90,000,000	95,000,000	95,000,000	90,250,000	89,000,000	87,750,000	86,750,000[m]	84,500,000	81,450,000	80,970,000	76,500,000	77,000,000	75,000,000	73,000,000	73,500,000	71,000,000
Illinois Central (non-charter property)																	
Capitalized Income[j]						93,529,000	99,198,000	104,161,000	105,046,000	107,571,000	102,941,000	100,091,000	91,842,000	84,892,000	79,110,000	66,375,000	58,927,000
Stock and Debt	(Data for Years Prior to 1951 Could Not Be Located by Director in 1963)					62,342,000	62,462,000	66,303,000	67,414,000	71,606,000	72,236,000	73,640,000	71,600,000	69,045,000	66,320,000	59,568,000	54,609,000
RCNLD Adjusted[j]						98,341,000	107,259,000	127,504,000	130,895,000	141,322,000	143,898,000	149,744,000	162,030,000	163,640,000	171,895,000	180,687,000	177,509,000
Formulaic Average						84,404,000	89,640,000	99,323,000	101,118,000	107,007,000	106,358,000	107,825,000	108,490,000	107,535,000	105,775,000	102,310,000	97,015,000
Less "Judgment Factor"[k]						12,504,000	17,140,000	25,823,000	26,918,000	32,207,000	31,358,000	32,325,000	33,790,000	34,325,000	34,525,000	31,460,000	28,990,000
ASSESSMENT	70,000,000	69,000,000	70,500,000	70,500,000	70,500,000	71,200,000*	72,500,000*	73,500,000*	74,200,000*	74,800,000*	75,000,000*	75,000,000*	74,700,000*	73,000,000*	71,350,000*	70,750,000	68,025,000
New York Central																	
Capitalized Income[j]						29,582,000	36,142,000	41,132,000	45,551,000	47,245,000	54,076,000	54,166,000	50,217,000	40,840,000	38,727,000	37,832,000	17,479,000
Stock and Debt	(Data for Years Prior to 1951 Could Not Be Located by Director in 1963)					39,600,000	41,168,000	43,996,000	47,197,000	50,932,000	53,607,000	51,393,000	50,600,000	48,240,000	46,971,000	41,690,000	38,072,000
RCNLD Adjusted[j]						120,418,000	129,480,000	131,721,000	136,960,000	166,503,000	156,537,000	154,790,000	161,575,000	156,370,000	149,922,000	151,287,000	144,597,000
Formulaic Average						64,723,000	69,910,000	72,283,000	76,569,000	88,227,000	88,073,000	86,783,000	87,464,000	81,817,000	78,540,000	73,603,000	66,716,000
Less "Judgment Factor"[k]						1,723,000	7,535,000	9,658,000	14,569,000	26,992,000	25,848,000	21,258,000	26,689,000	24,452,000	23,040,000	18,353,000	12,516,000
ASSESSMENT	64,500,000	64,000,000	63,000,000	63,000,000	63,000,000	63,000,000	62,325,000	62,625,000	62,000,000	62,225,000	62,225,000	62,525,000	60,750,000	57,365,000	55,500,000	55,350,000	54,200,000
Pennsylvania																	
Capitalized Income[j]						28,478,000	31,559,000	37,003,000	36,547,000	36,876,000	37,848,000	41,400,000	38,367,000	30,836,000	28,632,000	20,498,000	14,034,000
Stock and Debt	(Data for Years Prior to 1951 Could Not Be Located by Director in 1963)					40,033,000	39,545,000	40,850,000	39,753,000	41,023,000	40,850,000	42,480,000	42,254,000	40,583,000	38,964,000	36,713,000	35,095,000
RCNLD Adjusted[j]						100,587,000	110,894,000	116,257,000	115,540,000	123,812,000	123,640,000	134,700,000	142,782,000	139,728,000	141,725,000	149,004,000	149,870,000
Formulaic Average						56,630,000	60,970,000	65,045,000	64,600,000	67,237,000	67,446,000	72,860,000	74,468,000	70,382,000	69,774,000	68,738,000	66,330,000
Less "Judgment Factor"[k]						3,370,000	7,720,000	11,545,000	11,635,000	13,937,000	14,146,000	19,110,000	21,518,000	20,382,000	20,974,000	20,188,000	18,730,000
ASSESSMENT	66,860,000	65,304,000	60,231,000	58,000,000	55,000,000	53,250,000	53,250,000	53,500,000	52,965,000	53,300,000	53,300,000	53,750,000	52,950,000	50,000,000	48,800,000	48,550,000	47,600,000
Gulf, Mobile & Ohio																	
Capitalized Income[j]						57,182,000	57,790,000	61,537,000	62,494,000	64,174,000	64,499,000	62,267,000	53,003,000	45,701,000	41,650,000	34,765,000	31,397,000
Stock and Debt	(Data for Years Prior to 1951 Could Not Be Located by Director in 1963)					45,011,000	45,359,000	47,203,000	47,959,000	49,343,000	51,816,000	52,180,000	48,615,000	44,749,000	42,860,000	39,773,000	36,700,000
RCNLD Adjusted[j]						62,408,000	64,596,000	105,675,000	101,140,000	106,235,000	107,350,000	116,350,000	126,115,000	117,916,000	119,660,000	119,801,000	115,946,000
Formulaic Average						54,867,000	55,915,000	71,472,000	70,531,000	73,250,000	74,555,000	76,932,000	75,910,000	69,455,000	68,057,000	64,780,000	61,348,000
Less "Judgment Factor"[k]						8,867,000	9,015,000	22,077,000	20,536,000	22,255,000	23,305,000	25,232,000	24,915,000	19,755,000	19,307,000	16,530,000	15,598,000
ASSESSMENT	7,900,000	8,000,000 (Alton RR. acquired)	44,000,000	46,000,000	49,500,000	46,000,000*	46,900,000*	49,395,000*	49,995,000*	50,995,000*	51,250,000*	51,700,000*	50,995,000*	49,700,000	48,750,000	48,250,000	45,750,000
Wabash																	
Capitalized Income[j]						53,793,000	56,412,000	60,771,000	59,586,000	64,378,000	70,742,000	73,583,000	71,858,000	64,945,000	58,355,000	45,416,000	26,647,000
Stock and Debt	(Data for Years Prior to 1951 Could Not Be Located by Director in 1963)					31,989,000	32,341,000	36,319,000	38,518,000	42,051,000	43,755,000	44,957,000	45,721,000	46,265,000	46,075,000	45,926,000	47,453,000
RCNLD Adjusted[j]						66,297,000	74,065,000	85,106,000	83,060,000	88,855,000	88,300,000	97,722,000	101,700,000	104,270,000	103,970,000	105,123,000	102,266,000
Formulaic Average						50,693,000	54,273,000	60,732,000	60,388,000	65,095,000	67,599,000	72,088,000	73,093,000	71,827,000	69,467,000	65,488,000	58,789,000
Less "Judgment Factor"[k]						8,943,000	12,273,000	17,732,000	16,388,000	21,095,000	22,819,000	26,088,000	27,393,000	27,377,000	26,267,000	23,578,000	19,289,000
ASSESSMENT	40,911,370	41,871,000	42,892,000	42,497,215	41,953,215	41,750,000*	43,183,320*	44,419,370*	43,500,000*	44,000,000	44,750,000*	46,000,000*	45,700,000*	44,450,000*	43,200,000*	41,910,000*	39,500,000
New York, Chicago, St. Louis (Nickel Plate)																	
Capitalized Income[j]						40,760,000	44,619,000	46,715,000	45,256,000	45,902,000	43,704,000	43,324,000	42,870,000	41,515,000	41,162,000	38,807,000	35,516,000
Stock and Debt	(Data for Years Prior to 1951 Could Not Be Located by Director in 1963)					33,882,000	33,967,000	33,547,000	33,576,000	33,962,000	33,787,000	34,035,000	34,217,000	34,725,000	34,534,000	35,289,000	36,462,000
RCNLD Adjusted[j]						33,630,000	35,593,000	38,268,000	39,763,000	43,868,000	45,113,000	49,350,000	54,400,000	51,860,000	52,998,000	52,614,000	57,089,000
Formulaic Average						36,064,000	38,170,000	39,517,000	39,532,000	41,244,000	40,863,000	42,256,000	43,329,000	42,700,000	42,998,000	42,236,000	43,022,000
Less "Judgment Factor"[k]						6,305,000	8,170,000	9,217,000	9,032,000	10,494,000	10,118,000	10,956,000	12,829,000	12,325,000	12,623,000	11,986,000	12,772,000
ASSESSMENT	29,800,000	29,000,000	26,000,000	27,500,000	27,500,000	29,750,000*	30,000,000*	30,300,000*	30,500,000*	30,750,000*	30,750,000*	31,300,000*	31,000,000*	30,375,000*	30,375,000*	30,250,000*	30,250,000
Chicago & Eastern Illinois																	
Capitalized Income[j]																	

ASSESSMENT	26,000,000	26,000,000	26,000,000	27,500,000	27,500,000	29,750,000*	30,000,000*	30,300,000*	30,500,000*	30,750,000*	30,750,000*	31,300,000*	31,000,000*	30,375,000*	30,375,000*	
Chicago & Eastern Illinois																
Capitalized Income[l]						18,903,000	25,539,000	32,794,000	36,801,000	41,856,000	43,282,000	45,440,000	44,945,000	39,107,000	39,896,000	36,959,000	33,801,000
Stock and Debt	(Data for Years Prior to 1951 Could Not Be Located by Director in 1963)					20,491,000	22,962,000	27,614,000	30,961,000	34,353,000	37,998,000	38,322,000	38,317,000	35,628,000	37,649,000	36,963,000	34,923,000
RCNLD Adjusted[l]						53,078,000	53,125,000	64,557,000	64,203,000	70,947,000	71,703,000	77,655,000	83,700,000	77,800,000	81,553,000	87,292,000	87,532,000
Formulaic Average						30,824,000	33,513,000	41,655,000	43,988,000	49,052,000	51,026,000	53,805,000	55,854,000	50,845,000	52,773,000	51,935,000	48,179,000
Less "Judgment Factor"[k]						4,824,000	6,942,000	13,725,000	15,558,000	19,052,000	20,626,000	21,555,000	23,404,000	19,170,000	21,098,000	20,380,000	17,179,000
ASSESSMENT	25,000,000	25,000,000	25,000,000	25,000,000	25,000,000	26,000,000	26,600,000	27,930,000*	28,340,000*	30,000,000*	30,400,000*	32,250,000*	32,200,000*	31,675,000*	31,675,000*	31,555,000*	31,000,000
Illinois Terminal																
Capitalized Income[l]						21,140,000	21,194,000	18,927,000	16,818,000	15,607,000	13,681,000	18,237,000	17,749,000	13,419,000	10,294,000	10,267,000	9,273,000
Stock and Debt	(Data for Years Prior to 1951 Could Not Be Located by Director in 1963)					18,758,000	18,910,000	18,812,000	18,417,000	18,834,000	19,258,000	16,100,000	15,270,000	11,357,000	9,735,000	9,764,000	9,264,000
RCNLD Adjusted[l]						29,300,000	29,240,000	30,145,000	33,368,000	29,870,000	26,442,000	27,260,000	29,990,000	29,570,000	28,675,000	27,023,000	23,283,000
Formulaic Average						23,066,000	23,115,000	22,628,000	22,868,000	21,437,000	19,860,000	20,532,000	21,003,000	17,745,000	16,490,000	15,915,000	13,769,000
Less "Judgment Factor"[k]						2,266,000	2,515,000	2,728,000	3,668,000	2,937,000	2,360,000	3,032,000	4,003,000	4,245,000	4,150,000	3,665,000	2,069,000
ASSESSMENT	21,300,000	21,300,000	21,250,000	21,250,000	21,000,000	20,800,000	20,600,000	19,900,000	19,200,000	18,500,000	17,500,000	17,500,000	17,000,000	13,500,000	12,250,000	12,250,000	11,700,000
Terminal Railroad Association of St. Louis																
Capitalized Income[l]						18,285,000	18,613,000	20,238,000	19,836,000	19,532,000	19,902,000	19,750,000	19,435,000	18,744,000	18,530,000	16,450,000	15,120,000
Stock and Debt	(Data for Years Prior to 1951 Could Not Be Located by Director in 1963)					23,718,000	23,709,000	24,700,000	24,178,000	23,519,000	22,929,000	17,435,000	16,720,000	17,001,000	16,380,000	14,665,000	13,728,000
RCNLD Adjusted[l]						20,725,000	23,132,000	26,494,000	26,323,000	29,537,000	30,035,000	31,845,000	34,784,000	35,093,000	33,460,000	31,392,000	31,878,000
Formulaic Average						20,910,000	21,818,000	23,810,000	23,445,000	24,196,000	24,290,000	23,010,000	23,646,000	23,613,000	22,790,000	21,618,000	20,125,000
Less "Judgment Factor"[k]						910,000	2,068,000	4,110,000	3,745,000	4,496,000	4,590,000	3,360,000	4,396,000	5,838,000	5,696,000	4,618,000	3,453,000
ASSESSMENT	20,823,000	20,500,000	20,400,000	20,200,000	20,000,000	20,000,000*	19,750,000*	19,700,000*	19,700,000*	19,700,000*	19,700,000*	19,650,000*	19,250,000	17,775,000*	17,065,000*	17,000,000	16,800,000
Alton & Southern																
Capitalized Income[l]						12,472,000	12,770,000	12,972,000	13,618,000	14,310,000	15,185,000	15,798,000	15,782,000	14,767,000	14,655,000	13,280,000	12,078,000
Stock and Debt	(Data for Years Prior to 1951 Could Not Be Located by Director in 1963)					10,204,000	10,448,000	.....	8,447,000	8,645,000	9,075,000	13,947,000	13,577,000	13,293,000	12,935,000	11,860,000	11,264,000
RCNLD Adjusted[l]						6,175,000	6,507,000	6,797,000	6,670,000	7,219,000	7,193,000	7,575,000	8,190,000	8,670,000	9,027,000	9,442,000	9,592,000
Formulaic Average						9,617,000	9,908,000	9,885,000	9,578,000	10,058,000	10,485,000	12,440,000	12,516,000	12,276,000	12,206,000	11,567,000	11,511,000
Less "Judgment Factor"[k]						367,000	458,000	485,000	578,000	858,000	1,285,000	3,140,000	3,216,000	3,126,000	3,206,000	2,605,000	2,611,000
ASSESSMENT	6,500,000	6,600,000	6,900,000	8,300,000	8,800,000	9,250,000*	9,450,000*	9,400,000*	9,200,000*	9,200,000*	9,200,000*	9,300,000*	9,300,000*	9,150,000*	9,000,000*	8,963,000*	8,900,000*

NOTES

[a] On Jan. 1, 1946 Illinois' centralized Full Value Equalization Program went into effect. The railroads' assessments were distributed by the Director to the counties at value and the explicit equalization of railroad assessments down to the statewide level of assessments of locally assessed real estate affected by the Directors in prior years ended. See generally economist Lynn A. Stiles' "'Full Fair Cash Value' in the 1945 Illinois Assessment Equalization Program," 22 Bulletin of National Tax Association 34 (1946); Note, "Equalization of Railroad Assessments in Illinois," 35 Ill. Law Rev. 766 (1941). Also in 1946 inflation started, to continue unto this day. The price level began to shoot upwards and the inflating prices were reflected in the Director's staff's sales'-ratio studies of locally assessed property which were based on current sales prices related to corresponding assessments, and used in the formulation by the Director of equalization multipliers for the counties. The inflating prices were also reflected in the reproduction cost of railroad property as recorded by ICC's Bureau of Valuation and transmitted to the Director's Staff for use in the administrative formula for valuing railroad operating property. The ICC's staff's "Elements of Value" are in the Record as Peo. Ex. 72. The formula averaged three elements of value.

[b] In 1948 it was estimated by Director or his staff or both that the 1946 state-wide level of assessment of locally assessed real estate after application of the Director's multipliers was "around 75%" based on 1946 selling prices captured in the sales ratio studies. Lynn A. Stiles, the Director's "Railroad Assessor" as well as expert on locally assessed property, suggested an explicit 25% reduction of railroad assessments "so that they would stand in the same relationship to today's prices as do equalized assessments on real estate."

[c] Lynn A. Stiles, the Director's "Railroad Assessor," sent a January 26, 1949 memorandum on present railroad valuation and assessment procedures to an incoming Director. The memorandum described the valuation formula developed and refined after 1933 by economists Simeon Leland, George W. Mitchell and Stiles and does not mention the use of a "judgment factor" reduction and indicates that except in special situations the formulaic average essentially constitutes value. Peo. Ex. 113. Stiles confirmed the 1948 staff suggestion to reduce railroad assessments by 25% and reported "it suffices that no explicit adjustment was made in an effort to align railroad values with others." (emphasis not added.) Later in 1949 Stiles resigned from the Department of Revenue but before his departure he delivered "Railroad Assessment and Allocations," a paper in which he stated that and explained why the three elements of value used in the Illinois formula should be given equal weight. 1949 Proceedings of National Tax Association 418. The Director replaced Stiles as "railroad assessor" by a land appraiser, Raymond S. Danis, a long time staff member of the Property Tax Division of the Department and the predecessor Tax Commission who was made directly accountable to the Director and removed from the supervision of R. L. Maynard, Supervisor of the Chicago office of the Property Tax Division.

[d] In 1950 the state-wide equalized level of real estate assessment had receded to approximately 62% according to Railroad Witness Weil, an economist and former member of the Director's staff. See Weil, "Property Tax Equalization in Illinois," National Tax Journal 157 (June, 1953) (Peo. Ex. 67), who stated that the Director had been discounting inflated prices by "judgment reductions" in formulating equalization multipliers for the counties. In 1951 the level of assessment was about 70% according to Report No. 7 of the Illinois School Problems Commission 64 (1963).

[e] In 1950 the legislature freed the multipliers certified by the Director to the counties so that the certifications need be effected generally only once every four years instead of annually. State-wide level of assessment of locally assessed property has slipped to about 50% based upon sales data of real estate. Director reduced railroad assessments.

[f] In 1959 Raymond S. Danis retired. Railroad assessments were again decreased. Danis was replaced by Edward Koncel, retired tax representative of the Chicago & Eastern Illinois Railroad. In 1961 Koncel delivered a speech in Montreal saying the three elements of value should be given equal weight except in extraordinary situations. Rr. Ex. 106.

[g] Assessments admittedly arbitrarily formulated on predetermined industry basis by Assistant Director to "hold the line" with "judgment factors" adjusted to reach individual assessments. Railroad assessments were reduced. In July 1963 the legislature required explicit equalization of railroad assessments and later in 1963 the Director eliminated the "judgment factor" reductions and valued railroad property according to formulaic averages, producing an industry valuation of $1,377,000,000, and then applied an explicit equalization factor to reach assessments. Raymond Danis died.

[h] The CB&Q and the eleven other Appellees have accounted for about 60% of the total railroad state assessment in Illinois since about 1946.

[i] The Department used as the income base for all railroads "Net Railway Operating Income," an ICC accounting concept (after taxes), without needed accounting adjustments. Inherent defects in this element as a reflector of value include peculiarities of railroad accounting and managerial prerogative. Five year average used. 6% capitalization rate. Also, five year average of stock and debt values used. There are also defects in this element as a reflection of value. System figures derived and allocated into Illinois.

[j] System reproduction cost new as determined by the Bureau of Valuation of ICC and allocated into Illinois by Director's staff. ICC RCN based on period prices. RCN was sometimes reduced by Director's staff by applying a condition percentage lower than the ICC staff found, producing a lower RCN less depreciation and obsolescence than found by ICC staff. After 1952, Illinois allocation further reduced by Director's staff for "uneconomic property" in Illinois. After 1957, further sometimes reduced by Directors' staff by arbitrary 10% of adjusted "Road and General Expenditure" RCN. (more than 60% of RCN). The limited size of the staff is described in the Record.

[k] There is no data or rational evidence in the Record or elsewhere to support this item. The percentage relationship of the reductions to formulaic averages are on Peo. Ex. 31. "Judgment factors" were employed for practically all Illinois railroads.

[l] Minute analysis of this company is contained in Appendix F to People's Second Brief II Ill. Sup. Ct. Rec. 88.

[m] Held by the Supreme Court of Illinois not to exceed value. C&NW v. Department of Revenue, 8 Ill. 2d 278 (1956). The record in that case contained precise mathematical proof that the "judgment factor" reduction was enlarged in a precise amount to carry over the prior year's assessment and reduce the prior year's assessment by $1,000,000 even though the formulaic average increased $5,086,000. However, the "judgment factor" was not in issue. The Court questioned it and confirmed that the Record did not include an explanation.

[n] Madison County's largest railroad taxpayer owned by 15 railroads including seven of the Appellees.

[o] Assessment less than average of capitalized income and securities elements of value. In the case of the CB&Q, less than capitalized income. (CB&Q's common stock was mostly owned by Northern Pacific and Great Northern).

(This data permits precise proof that the "judgment factor" was a technique by which the influence of inflation in formulaic averages was suppressed and prior year's assessments were generally either held steady or decreased to implement a policy of holding the line or reduce assessments to stabilize or decrease discrimination. The key working tools are the Rules of 1 for 3 and 3 for 1: an increase of 3 in an element of value equals an increase of 1 in the average. A reduction of the average by 1 via the "judgment factor" equals a reduction of 3 from an element of value.)

APPENDIX F.

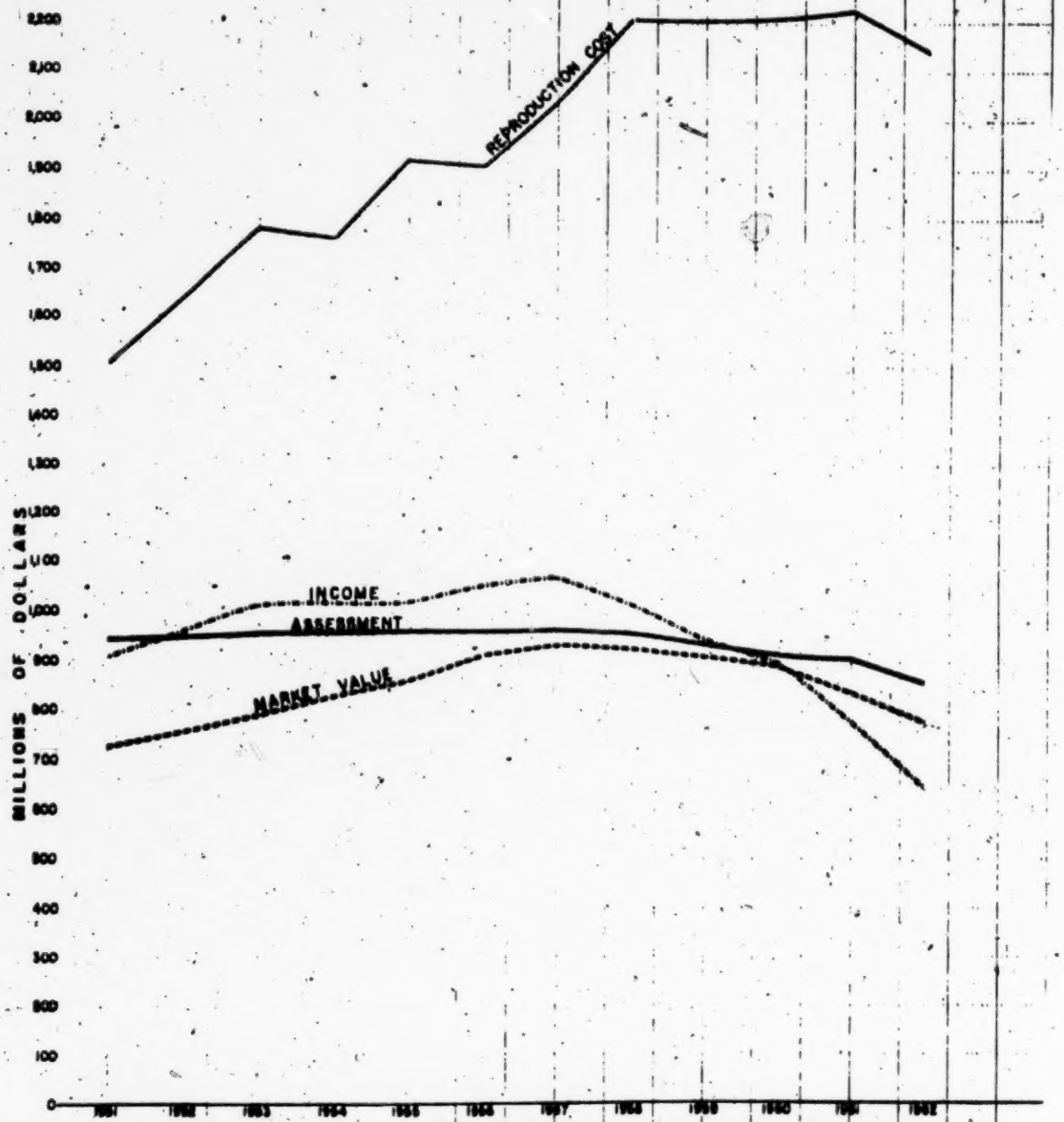
["Holding the Line"]

OBJECTORS' EXHIBIT NO. 86

Graph showing aggregate of each of the three valuation indicators and assessments for all railroads assessed on the basis of the three factor formula in Illinois for the period 1951 - 1962, incl.

GRAPH SHOWING 3 VALUATION INDICATORS AND ASSESSMENT FOR PERIOD 1951—1962 *

(SOURCE: DEPARTMENT OF REVENUE, STATE OF ILLINOIS, RAILROAD ASSESSMENT DATA SHEETS FOR PERIOD 1951—1962)



* INCLUDES FIGURES FOR ALL ILLINOIS RAILROADS COVERED BY COLLECTOR'S EXHIBIT "4" EXCEPT: AURORA, ELGIN & FOX RIVER, CHICAGO & CALUMET RIVER, CHICAGO & WESTERN INDIANA, CHICAGO, PEORIA & WESTERN, CHICAGO UNION STATION CO., COLUMBIA & MILLSTADT, DAVENPORT, ROCK ISLAND & NORTHWESTERN, DU PUE & NORTHERN, JERSEYVILLE & EASTERN, JOLIET UNION DEPOT CO., LEE COUNTY CENTRAL, MANUFACTURER'S RAILWAY OF ST. LOUIS, MISSOURI BRIDGE & BELT, PADUCAH & ILLINOIS, PEORIA TERMINAL, SOUTHERN ILLINOIS & MISSOURI BRIDGE COMPANY.

APPENDIX G.

(Entered February 1, 1966.)

In the District Court of the United States
For the Middle District of Tennessee,
Nashville Division.

Louisville and Nashville Railroad Company,
v.
Public Service Commission of Tennessee; State Board of Equalization of Tennessee, et al.
Docket No. 4310.

Opinion.

This action presents the question whether a federal court may intervene to grant injunctive relief to a taxpayer whose property, in violation of state law, has been substantially over-assessed in relation to other taxpayers in the state. Since tax laws are ancient and unrelenting, they have spawned much litigation, and the Court is not without some guidelines in the decision of the present controversy.

Jurisdiction is invoked on the grounds of (1) Federal question jurisdiction (commerce clause and Fourteenth Amendment), and (2) diversity jurisdiction. The first is denied by the defendants, and the second is admitted. Because the Court has concluded that jurisdiction exists under the equal protection clause, it is not necessary to determine whether or not relief could be granted if diversity were the sole basis of jurisdiction . . . The Court notes, however that such relief might well be barred by the holding in Erie R. Co. v. Tompkins, 304 U. S. 64 (1938), and subsequent cases.

In Angel v. Bullington, 330 U. S. 183 (1947), for example, the Court stated that:

> The essence of diversity jurisdiction is that a federal court enforces State law and State policy. If North Carolina has authoritatively announced that deficiency judgments cannot be secured within its borders, it contradicts the presuppositions of diversity jurisdiction for a federal court in that State to give such a deficiency judgment. . . . . A federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld. Availability of diversity jurisdiction which was put into the Constitution so as to prevent discrimination against outsiders is not to effect discrimination against the great body of local citizens.
>
> Cases like . . . are obsolete insofar as they are based on a view of diversity jurisdiction which came to an end with Erie Railroad v. Tompkins, 304 U. S. 64. That decision drastically limited the power of federal district courts to entertain suits in diversity cases that could not be brought in the respective State courts or were barred by defenses controlling in the State courts (pp. 191-192).

See also, Ragan v. Merchants Transfer Co., 337 U. S. 530, 532 (1949) ("if recovery could not be had in the state court, it should be denied in the federal court.") And see, Guaranty Trust Co. v. York, 326 U. S. 99 (1945); Allstate Insurance Company v. Charneski, 286 F. 2d 238, (7th Cir., 1960); Berger v. State Farm Mutual Automobile Co., 291 F. 2d 666 (10th Cir., 1961); and Arrowsmith v. United Press International, 320 F. 2d 219 (2d Cir., 1963). Cf., Byrd v. Blue Ridge Cooperative, 356 U. S. 525 (1958); and Hanna v. Plumer, 380 U. S. 460 (1965).

It is admitted that if the plaintiff brought suit in a Tennessee state court, relief would be barred by the Ten-

nessee rule that a taxpayer cannot sue to have his own taxes reduced; he may sue only to have the taxes of his neighbors increased, and then, only if he can first show that his property is assessed in excess of actual cash value. See, e. g., Carroll v. Alsup, 107 Tenn. 257, 284, 64 S. W. 193, 200 (1901); McCord v. Nashville, Chattanooga & St. L. Ry., 187 Tenn. 277, 213 S. W. 2d 196 (1948); Mayor and Aldermen of the Town of Morristown v. Burke, 207 Tenn. 180, 338 S. W. 2d 593 (1960); and Biltmore Hotel Court v. City of Berry Hill, ... Tenn. ..., 390 S. W. 2d 223 (1965). A citizen of Tennessee, then, could not win this action in a state court under existing state law, and he could not, because of lack of diversity, bring the action in a federal court. No sufficient reason appears why a non-citizen of this state should be able to invoke diversity jurisdiction in a federal court to reach a result on a state question which state citizens could not reach.

In Tennessee, all railroad and utility property is assessed by the Public Service Commission. All other property is assessed by county assessors and local officials. Both the Commission and county assessors are required by state law to assess all property within their respective jurisdictions at its actual cash value (See Appendices "A" and "B"). The assessment roles of all property assessed by county assessors are brought before the respective county boards of equalization, whose duty it is to equalize the assessment of all property within the county by assessing all property at its actual cash value (See Appendix "B"). The equalized assessments of the county boards, and the assessments of the Public Service Commission, are reviewed by the State Board of Equalization, whose duty it is to equalize the various county board assessments and the Public Service Commission assessments upon the basis, for all property, of actual cash value (See Appendix "B"). The State Board of Equalization then certifies back to each county the final

equalized assessment of the properties assessed by that county, and to the Public Service Commission the final equalized assessment of the properties assessed by the Commission. The latter certification was made with respect to plaintiff's property on November 23, 1965. Because of the pendency of this action and the issuance of a temporary restraining order, the Public Service Commission has yet certified to the various counties and municipalities in which the plaintiff's property is located, the final assessed value of plaintiff's property. Following certification to the counties and municipalities, the taxes based upon the certified assessments will become due and payable.

The plaintiff in this civil action seeks to restrain the Public Service Commission from certifying assessments for the years 1965-66 on all of the property of the plaintiff located in the state. It alleges that if the certification is not enjoined, the plaintiff will have to pay taxes to 54 counties and to at least 104 municipalities and will be without an adequate remedy under state law to obtain relief from what it claims is an illegal assessment of its property.

Plaintiff alleges that property assessed by the Public Service Commission is assessed at actual cash value, and that property assessed by county assessors is assessed at a state-wide average of 30% of actual cash value, with assessments ranging from a low of 7% to a high of 50%. It is alleged that this practice is systematic and intentional, and of long-standing. The defendants admit that property assessments are not uniform throughout the state, that assessments have been at less than 100% of actual cash value, and that "railroad and utility properties, being centrally assessed by the Public Service Commission, are generally assessed at a level considerably higher than the level at which locally assessed properties

are assessed." The defendants, however, would hold the plaintiff to strict proof both of the exact percentage of the plaintiff's assessment, and the exact percentage at which local properties are assessed. Nevertheless, even by the defendants' own admission, the plaintiff's property is assessed at not less than 55 or 65% of its actual cash value; and the evidence before the Court clearly demonstrates that all other properties are assessed at a statewide average of not more than 30% of their actual cash value (See Appendix "C.").

Defendants concede that the Public Service Commission is required by law to assess plaintiff's property at its actual cash value. They contend, however, that the Commission disregarded state law and assessed plaintiff's property at only 60 to 70% of actual cash value. Since the State Board of Equalization reduced the Commission's assessment by approximately 5%, defendants claim that plaintiff's final, equalized assessment is only 55 to 65% of actual cash value. This claim is based upon the fact that the Commission's assessment calculations included a "judgment factor." Defendants claim that this judgment factor was applied after the Commission had first determined actual cash value. Plaintiff claims that the judgment factor was applied in order to determine the actual cash value. The transcript of the hearing before the State Board would seem to support plaintiff's position. At the hearing, the following exchange took place:

> **Mr. Clyde W. Key: May I ask Dr. White a couple of questions? [Dr. White is the tax and rate consultant to the Public Service Commission.]**
>
> **The Chairman: Yes, sir.**
>
> **Mr. Key: Dr. White, your ultimate goal is to reach actual cash market value after application of your seventy-percent factor, and your judgment factor, is that correct?**
>
> **Mr. White: Yes, sir.**

[Emphasis added.]

The Chairman: Mr. Key, you know we are not going to admit anything except one hundred percent assessment (Tr. pp. 5-6).

It is not necessary, however, to determine whether or not the Commission assessed the plaintiff's property at actual cash value, since a final, equalized assessment of even 55% (which is the lowest assessment claimed by the defendants) is substantially higher than the average assessment percentage of locally assessed property, either state-wide or in the 54 counties through which plaintiff operates. By referring to the Tennessee Taxpayers Association Report in Appendix "C," and calculating the average assessment ratio of the 54 counties through which the plaintiff operates, it appears that the locally assessed properties in those counties are assessed at an average of approximately 20% of actual cash value. Thus, even on the basis of defendants' contention that plaintiff's property is assessed at only 55 to 65% of actual cash value, there would be a discrimination against plaintiff's property and in favor of locally assessed property of 35 to 45% in the counties through which plaintiff operates. If, on the other hand, the Court were to agree with plaintiff that its property had been assessed at full cash value by the Public Service Commission, then, taking into account the fact that the State Board of Equalization reduced the Commission's assessment by 5%, there would be a disparity in assessment ratios between the assessment of plaintiff's property and locally assessed property in the counties through which plaintiff operates of 75%. Under either approach, there exists in the challenged assessment a clearly invidious discrimination which is systematic, intentional, and of long-standing.

Nashville, Chattanooga & St. L. Ry. v. Browning, 310 U. S. 362 (1940) involved almost identical facts and constitutional claims. The case arose under Tennessee's 1932 Code, § 1526 [now 67-911] which made it the duty of

[Emphasis added.]

the railroad and public utilities commission [now the Public Service Commission] to assess all railroad property at its "actual cash value." The Commission so assessed the railroad's property, and the railroad appealed to the State Board of Equalization on the ground that all property not assessed by the Commission was assessed at substantially less than actual cash value in violation of Code 1932, § 1349 [now 70-605]. The Board confirmed the Commission's assessment, and the railroad then brought suit in the Circuit Court for Davidson County to have the action of the Board reviewed. The trial judge dismissed the petition and the railroad appealed to the Supreme Court of Tennessee. That Court found that the railroad's evidence did not overcome the presumption that the State Board had equalized all property at its actual cash value, and on this ground affirmed the trial court's dismissal. The railroad then petitioned the Supreme Court of the United States for certiorari, which was granted. The Court first dismissed the railroad's commerce clause claim. The claim was based on the fact that the Commission's assessment was arrived at by determining the value of the railroad's property in all states, and taking a percentage of that value, which represented the ratio of the railroad's track mileage in Tennessee to its total track mileage, as the value of the railroad's property in Tennessee. In the present case, however, the commerce clause claim is quite different. The railroad contends that the amount of taxes paid in Tennessee is much higher than the amount of taxes paid in other states and is, indeed, so much higher as to restrain interstate commerce. The railroad, however, does not allege or contend that its properties are being taxed any higher than purely intrastate railroads or intrastate utilities, and for this reason the railroad's commerce clause objection is without merit.

In Browning, the Court denied the railroad's equal protection claim under the Fouprteenth Amendment on the

ground that the evidence before the Court did not warrant the overturning of the express finding of the Supreme Court of Tennessee that the railroad had not proved discrimination. There was nothing in the record before the Court to indicate that the Tennessee State Board of Equalization had not equalized all property within the state at its actual cash value, and the Court, therefore, accepted the express finding of fact of the Supreme Court of Tennessee on this issue. If that were all the Court had to say on the railroad's Fourteenth Amendment claim, the case would not be of any concern in the present litigation since we have before us no such finding of fact by the Tennessee Supreme Court, but instead, conclusive evidence to the contrary. The Court proceeded, however, to consider the railroad's equal protection claim as if the State Supreme Court had found that the railroad was, in fact, treated differently for tax purposes from the majority of property owners in the state. Since this latter consideration was clearly unnecessary to the decision of the case, it would appear that the Supreme Court's discussion concerning it may be regarded as dicta. Nevertheless, the words of the Supreme Court, though dicta, should be respected and followed by this Court unless there are compelling reasons to believe that the Supreme Court itself would not apply such dicta to the facts of this case. The Court is of the opinion that such compelling reasons do exist, and that the Supreme Court on the basis of the present record, and in the light of the unambiguous provisions of the Tennessee Constitution and statutes, as well as the authoritative rulings of its highest court, would not follow the manifestly erroneous conclusion that state law permitted or allowed classifications of property for tax purposes.

Basically, the Court in Browning reasoned as follows: the states have the power to establish different classes of property for tax purposes; if such classes are reasonable

different treatment for taxpayers in different tax classes raises no equal protection problem; if railroads and utilities were placed by the states into one class and all other property into another class, such a classification would be reasonable; therefore, since "so far as the Federal Constitution is concerned, as state **can** put railroad property into one pigeonhole and other property into another, **the only question relevant for us is whether the state has done so**" (p. 369, emphasis supplied). This question is relevant because the Fourteenth Amendment commands equality of treatment unless the state has established different and reasonable classes of property. In the absence of classification by the state, there is no federal classification which would permit different tax treatment for railroads. With this reasoning, no one can argue. The difficulty with the Browning opinion lies in its finding that state law had, in fact, established different classes of property. It is beyond question that both now and at the time of the Browning decision, the Tennessee Constitution expressly prohibits the classification of property for tax purposes. (See Appendix "A".) It is equally clear that both now and at the time of the Browning decision, the Tennessee statutes, with criminal sanctions, in terms admitting of no doubt or uncertainty, prohibit the classification of property for tax purposes, or the valuation of any property at less than its actual cash value. (See Appendix "B".) The Supreme Court made no specific reference to these explicit constitutional and statutory provisions, stating that a "practice, systematic, unbroken for more than forty years," of treating railroads and utilities differently from other properties, demonstrated that state "law" provided for the classification. The Supreme Court looked at this "settled state practice" as a "gloss" upon the state statutes, and, inferentially, as a gloss upon the state constitution. In traditional jurisprudence, such a gloss is relied upon to construe state law only if the state constitu-

tion or the state statutes are ambiguous, which the Tennessee Constitution and statutes admittedly are not. Still, even if we should assume that the State Constitution and statutes are ambiguous, state practice can be relied upon as a gloss only if there is no judicial determination of the meaning of the State Constitution and statutes by the state courts, for the reason that the state's highest court, not the United States Supreme Court, is the final authority with respect to what is, and what is not, state law. Browning, then, should fairly be regarded as having been based upon the assumption that the Tennessee law on the question of classification of property for tax purposes was not clear, or had not been authoritatively settled by the State's Supreme Court. Indeed, the Supreme Court did not cite a single state court decision. The Court's principal reference to the state courts was as follows: "If the state supreme court **had** construed the requirement of uniformity in the Tennessee Constitution so as to **permit** recognition of these diversities, no appeal could successfully be made to the Fourteenth Amendment" (p. 369, emphasis supplied). In fact, however, the State Supreme Court long before Browning had construed the requirement of uniformity in the Tennessee Constitution as expressly prohibiting the under-assessment or under-taxation of any type or species of property, a decision from which it has never deviated.

Carroll v. Alsup, 107 Tenn. 257 (1901), did not involve a Public Service Commission assessment but it demonstrates conclusively that state law requires that for assessment and taxing purposes all property within the state shall be treated as a single class; that all property shall be assessed at actual cash value; and that all taxes shall be equal and uniform:

> There are, then, two fundamental principles to be taken as guides in assessing property under our Con-

stitution and laws: (1) That **all property** shall be assessed at its actual cash value; and (2) that taxes shall be equal and uniform. . . . However difficult it may be to arrive at the first result, it is **imperatively demanded by the Constitution and laws**, and the second unavoidably and from necessity follows it, and to adopt a cash valuation is the only basis upon which it is practicable to make taxes equal and uniform (p. 283, emphasis supplied).

. . . The recourse offered to the taxpayer is not to reduce his own assessment, unless it is beyond its actual cash value, but to have that of his neighbor increased until **both** reach the point of actual cash value and thus become equal and uniform, as **the law provides and the Constitution contemplates.** This idea is manifested in many provisions of the statute not necessary to be specifically pointed out. It may be found in every section that refers to value (p. 284, emphasis supplied).

. . . We will not stop to comment on these cases further than to say that the doctrine of assessment and taxation upon a percentage of value instead of true value or actual cash value finds no warrant in the language used in the Reelfoot Lake case (p. 289).

. . . But it by no means warrants the idea that a percentage of value may be made the basis of assessment, but, on the contrary, the "actual value," or "true value," or "cash value," the expressions being synonymous, are made the basis by which the tax or value must be graduated or determined (pp. 289-90).

It was evidently the purpose of the General Assembly in the Act of 1899, to escape the percentage valuation idea **as to any and every kind of taxable property**, and fix upon the actual cash value as the basis upon which all assessments should be made so as to meet **both requirements of the Constitution**, the assessment of property at its value, and at the same

time taxation should be equal and uniform. The Constitution of 1870, Art. 2, Sec. 28, directs that **all property** shall be taxed according to value, that value, to be ascertained in such manner as the Legislature may direct, so that taxes shall be equal and uniform throughout the State, and so that **no species of property** from which a tax may be collected **shall be taxed heavier than any other species of property of the same value** (p. 290, emphasis supplied).

. . . under our system there is but one basis upon which values can be made finally to rest, and that is the actual cash value, and until that is reached no property is free from the machinery of the law designed to place it on that basis (p. 291).

. . . and in this way the Courts, Legislatures and taxpayers will co-operate to tax **all property** at its actual cash value and to make all taxes equal and uniform, **as the Constitution contemplates.** The actual cash value is the only practicable basis upon which taxes can be made equal and uniform, and this is **clearly the constitutional requirement, the legislative intent,** and should be the effort of the Court as well as taxpayers (p. 292, emphasis supplied).

And in City of Chattanooga v. Railroad Co., 75 Tenn. 438 (7 Lea 561, 1881), the Court stated:

It is clear from the provisions quoted, that the limitations upon the exercise of the taxing power in reference to all property in our State are, that all property be taxed according to its value, so that taxes shall be equal and uniform throughout the State, and "no one species of property from which a tax may be collected, shall be taxed higher than any other species of property of the same value" (p. 566, Lea).

. . . and it must be equal and uniform throughout the State, and the assessment so made that no one species of property shall be taxed higher than any

> other species of the same value. The principle on which the value is ascertained, must necessarily be the same in order to this result. There can be no variable amount demanded or fixed on this value for the whole State, nor in any defined division or territory, as a county or incorporated town, having the power to levy taxes. Such taxes must be levied on the same principle as that prescribed for State taxation . . . (p. 567, Lea).
>
> . . . we know of no constitutional principle on which railroad property of this character can be valued by a different rule from that of other citizens (pp. 574-75, Lea).

Similary, in Brown v. Greer, 40 Tenn. 528 (3 Head 695, 1859), the Court stated:

> In this case, from the description of slaves, it is clear that they are not assessed at much more than half their cash value. This is a great abuse and ought to be reformed. All property ought to be assessed at their fair value, and that can only be determined by the ordinary selling and buying prices for cash, at the time. To place it any lower than this standard is a palpable dereliction of duty on the part of those whose duty it is made by law to value it, and it is difficult to see how the district or town assessors can reconcile their practice in this respect to their duty, enforced by a solemn oath (pp. 696-97, Head).

See also, the similar interpretation of state law by the Court of Appeals for this Circuit in Taylor v. Louisville & Nashville R. Co., 88 F. 350 (6th Cir., 1898), which the Supreme Court in Browning did not cite or attempt to distinguish.

The Tennessee Supreme Court in decisions subsequent to Browning has not departed from the ruling in Carroll v.

Alsup that the Tennessee Constitution and statutes require all property to be assessed at actual cash value. See, e. g., McCord v. Nashville, Chattanooga & St. L. Ry., 187 Tenn. 277, 213 S. W. 2d 196 (1948); Mayor and Aldermen of the Town of Morristown v. Burke, 207 Tenn. 180, 338 S. W. 2d 593 (1960); and Biltmore Hotel Court v. City of Berry Hill, ... Tenn. ..., 390 S. W. 2d 223 (1965).

The Court is thus confronted with this situation:

The United States Supreme Court, relying solely on a state administrative practice, has stated (although in dicta) that the "law" of Tennessee recognizes different classes of property for tax purposes. On the other hand, the Supreme Court of Tennessee has ruled without exception that the assessment of any property at less than actual cash value is a direct violation of the State Constitution and statutes, which expressly prohibit classification of property for tax purposes. Under these facts, it seems clear that the duty of this Court is not to be guided by the comments of the Supreme Court of the United States as to what the law of Tennessee is, but rather to accept the pronouncements of the highest court of Tennessee, and the unambiguous provisions of that state's constitution and statutes, that any difference in the assessment of railroad and utility property, in relation to other properties, is a flagrant violation of state law. This is especially true in a case where such comments may properly be regarded as dicta, and where the highest court of Tennessee in decisions after the Supreme Court's comments, has made no departure from its own interpretation of state law. Any other ruling in this case would mean that a federal court would be required to accept as the law of the state, not the authoritative rulings of its Supreme Court, but the admittedly conflicting practice of state administrative agencies.

In Tennessee, therefore, there is, for tax purposes, but one class of property, as its laws so emphatically provide.

Since the Fourteenth Amendment clearly prohibits unequal treatment within a class, the substantially and systematically higher assessment percentages for railroad and utility property, as opposed to other properties, is a violation of the equal protection clause of the Fourteenth Amendment, and entitles the plaintiff to relief. Sioux City Bridge v. Dakota County, 260 U. S. 441, 446 (1923):

> This Court holds that the right of the taxpayer whose property alone is taxed at 100 per cent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of the statute. The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law.

In Sunday Lake Iron Co. v. Wakefield, 247 U. S. 350, 352-53 (1918), the Court ruled:

> The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute **or by its improper execution** through duly constituted agents. And it must be regarded as settled that intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property (emphasis supplied).

Lower federal courts have reached the same results. See, for example, Wyandotte Chemical Corp. v. City of Wyandotte, 199 F. Supp. 582, 584 (E. D. Mich. 1961) (rev'd on sole ground that Michigan law provided an adequate remedy, 321 F. 2d 927 (6th Cir., 1963)):

> Improper execution of the laws through duly constituted agents, which results in arbitrary discrimination of taxable property in the same class, as defined by state law, and thereby taking property without due process of law and failing to give it the equal protection of the law, constitutes a federal question beyond all controversy [citing cases].
>
> It should be pointed out that this court is inclined to agree with the defendants that industrial property could reasonably be classified separately and assessed under a different method while conforming to the dictates of equal protection of the laws [citing Browning]. However, when the Constitution prohibits such a separate classification, and the statutes do not permit it, and the State Tax Commission has allegedly recognized the requirement of equal treatment, it cannot be said that "settled state practice" has established state law of separate classifications.

And see, In re Chicago Rys. Co., 175 F. 2d 282 (7th Cir., 1949); Louisville & Nashville R. Co. v. Bosworth, 230 F. 191 (E. D. Ky., 1915); (This case was modified sub. nom. Louisville & Nashville R. R. Co. v. Greene, 244 U. S. 522 (1917), which affirmed the lower court's finding that the railroad was entitled to relief, but which reversed on the ground that the railroad might be entitled to greater relief than that granted by the lower court.); and Delaware, Lackawanna and Western R. Co. v. Kingsley, 189 F. Supp. 39 (D. C. N. J., 1960) (distinguishing Browning on the ground that the New Jersey Constitution and statutes do not classify property for tax purposes. Of course, neither do the Constitution and statutes of Tennessee, which points up the difficulties of the Browning dicta).

. . . The defendants, opposing the relief sought by the plaintiff, contend that the Court may not "enjoin, suspend or restrain the assessment, levy or collection of any tax

under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U. S. C. A. § 1341.

Plaintiff's allegation that state remedies are not plain, speedy or efficient is denied by defendants on the ground that there are at least three ways in which the plaintiff's complaint can be brought before the state courts—in a suit for tax refund after payment, by certiorari to the Davidson County Circuit Court, and by suits in equity to enjoin the assessment as the basis for local taxes. It is clear, however, that even though the plaintiff theoretically could pursue these procedural avenues in the state courts, state law would bar relief to the plaintiff unless the plaintiff could prove that it has been assessed at more than actual cash value, which of course it cannot do. Even if plaintiff were assessed at more than actual cash value, state law would prohibit any reduction in plaintiff's assessment, and would only permit the assessments of all other taxpayers to be increased. Carroll v. Alsup, 107 Tenn. 257 (1901); McCord v. Nashville, Chattanooga & St. L. Ry., 187 Tenn. 277, 213 S. W. 2d 196 (1948); Mayor and Aldermen of the Town of Morristown v. Burke, 207 Tenn. 180, 338 S. W. 2d 593 (1960); and Biltmore Hotel Court v. City of Berry Hill, ... Tenn. ..., 390 S. W. 2d 223 (1965). Defendants admitted at the hearing that, unless the Supreme Court of Tennessee were to reconsider its prior holdings, the plaintiff would not be entitled in the state courts to the relief it now seeks. The Supreme Court of the United States has ruled in an analogous situation that a remedy such as that provided in the courts of Tennessee is, in effect, no remedy at all, and is certainly not sufficiently plain, speedy and efficient to bar federal equity relief. Township of Hillsborough v. Cromwell, 326 U. S. 620, 624 (1946) (suit for declaratory judgment, but adequacy of state remedies analyzed in terms of suit for an injunction); Sioux City Bridge v. Dakota County, 260

U. S. 441, 446 (1923); and Greene v. Louisville & Interurban R. R. Co., 244 U. S. 499 (1917) . . . Furthermore, in a suit strikingly similar to the present, the Sixth Circuit has affirmed a District Court injunction and has sustained federal equity jurisdiction in order to prevent a multiplicity of suits and in order to remove a cloud from plaintiff's property in Tennessee. Taylor v. Louisville & N. R. Co., 88 F. 350 (6th Cir., 1898). Taylor was a diversity case decided before Erie, and it may not today be controlling in a suit based solely on diversity, but it is significant to note that the Court at that time held that Tennessee law prohibited classification of property for assessment purposes, a decision contrary to the Supreme Court's intimation in Browning that the type of classification involved in this case was never "questioned" before the Browning case. As we have seen, that is still the law in Tennessee, and since there is no plain, speedy, and efficient remedy in Tennessee to correct the intentional and systematic violations of either its own law or of the Fourteenth Amendment, federal declaratory and injunctive relief is not only proper but necessary for the protection of plaintiff's constitutional rights. The defendants' abstention argument has been considered by the Court. But in view of the settled state rule, the Court is persuaded that any appeal to the state courts would be in vain.

The Court is aware of the impact of the present decision upon the tax structure of the state and its subdivisions, since the type of discriminatory treatment here involved is deep-seated and of long-standing and many governmental programs have been patterned accordingly. Realizing the possibility that a ruling in its favor could have serious disruptive effects throughout the state, the plaintiff, in open court, offered to accept the assessment of $74,865,850.00, as determined by the State Board of Equalization, less a reduction of 15%, for the current

tax biennium, without prejudice to its rights as to future tax years, and without prejudice to its insistence that the discrimination against it is represented by a much higher percentage. The defendants have made no response to this offer. In any event, it does not appear that the Court should undertake to decree or enforce any particular reduction in the plaintiff's assessment or to determine what the assessment should be to eliminate the existing discrimination against the plaintiff. At least in the first instance, this is a task for the State Equalization Board, acting in such way as to remove from the existing assessment any invidious discrimination, with a minimum of disruption to the revenues of the state and its subdivisions. Wyandotte Chemical Corp. v. City of Wyandotte, 321 F. 2d 927, 931 (6th Cir., 1963), quoting from Helmsley v. City of Detroit, Michigan, 330 F. 2d 476 (6th Cir., 1963).

A form of judgment will be submitted declaring the rights of the plaintiff consistently with this opinion, and enjoining the defendants from certifying or enforcing the challenged assessment of plaintiff's property, without prejudice to the right of the State Board of Equalization to rehear and reconsider the assessment so that it may be made to conform with the requirements of equal protection of the law under the Fourteenth Amendment. Pending such re-determination, the case will be retained on the active docket, with either party having the right to apply to the Court at any time for other or additional orders.

/s/ William E. Miller,
United States District Judge.

(Appendices Omitted.)

[Emphasis added.]

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 1046.

PEOPLE OF THE STATE OF ILLINOIS ex rel. GEORGE MUSSO, Madison County Treasurer and Ex-Officio Collector of Taxes of Madison County, Illinois,
Appellants,
vs.
CHICAGO, BURLINGTON AND QUINCY RR. CO., CHICAGO & NORTHWESTERN RR. CO., GULF, MOBILE AND OHIO RR. CO., CHICAGO AND EASTERN ILLINOIS RR. CO., ILLINOIS CENTRAL RR. CO., NEW YORK CENTRAL RR. CO., NEW YORK, CHICAGO & ST. LOUIS RR. CO., WABASH RR. CO., PENNSYLVANIA RR. CO., ILLINOIS TERMINAL RR. CO., ALTON & SOUTHERN RR. CO., and TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Appellees.

On Appeal from the Supreme Court of Illinois.

MOTION TO DISMISS OR AFFIRM.

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IN THE

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PEOPLE OF THE STATE OF ILLINOIS ex rel. GEORGE MUSSO, Madison County Treasurer and Ex-Officio Collector of Taxes of Madison County, Illinois,
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CHICAGO, BURLINGTON AND QUINCY RR. CO., CHICAGO & NORTHWESTERN RR. CO., GULF, MOBILE AND OHIO RR. CO., CHICAGO AND EASTERN ILLINOIS RR. CO., ILLINOIS CENTRAL RR. CO., NEW YORK CENTRAL RR. CO., NEW YORK, CHICAGO & ST. LOUIS RR. CO., WABASH RR. CO., PENNSYLVANIA RR. CO., ILLINOIS TERMINAL RR. CO., ALTON & SOUTHERN RR. CO., and TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Appellees.

On Appeal from the Supreme Court of Illinois.

MOTION TO DISMISS OR AFFIRM.

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move to dismiss these appeals or to affirm the judgment of the Illinois Supreme Court, for the following reasons:

1. They do not question the validity of any statute of any state on the grounds of its being repugnant to the Constitution, the treaties or laws of the United States,

nor do they involve the validity of any treaty or statute of the United States.

2. They do not involve any substantial federal question, but merely adjudicate questions of fact turning upon the analysis and consideration of voluminous testimony and exhibits, without involvement of any federal question but entirely and adequately based upon well settled non-federal grounds; and

3. The judgments below lack finality as there are presently pending adversary proceedings in the trial court concerning the computation of refunds due appellees.

STATEMENT OF THE CASE.

These are direct appeals from judgments of the Supreme Court of the State of Illinois which reversed judgments of the Circuit Court, Third Judicial Circuit of Illinois, Madison County, and remanded each cause with directions to order, in each case, a refund of taxes paid under protest by the objecting railroad in conformity with the method outlined in two earlier decisions of the Illinois Supreme Court in the **Hillison** and **Kohorst** cases and subject only to the limitations there fixed[1] The final refund orders have not been entered by the trial court although they have been tendered by the railroads.

This litigation involves objections filed by the appellees to the real estate taxes extended against the assessed valuation of their railroad operating property located in Madison County, Illinois, during the period 1957 to 1962, inclusive, pursuant to the remedy recognized by the Illinois Supreme Court in the **Callahan** case and subsequently confirmed in the **C. B. & Q. Railroad Co. Valuation** case.[2] The objections were filed in response to the annual application of the People of the State of Illinois ex rel., the incumbent county treasurer and ex officio county collector of Madison County seeking a judgment for delinquent taxes. The valuation objections of the railroads which are in dispute in the instant cases were based upon a failure of the Department of Revenue to assess and equalize all taxable property in Madison County at its full fair cash value as required by the Illinois Revenue

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[1] A copy of one of the Illinois Supreme Court Judgments is set out in Appellants' Jurisdictional Statement, Appendix "C", p. A-45; see People ex rel. Hillison v. CB&Q RR. Co., 22 Ill. 2d 88, 174 N. E. 2d 175, and People ex rel. Kohorst v. GM&O RR. Co., 22 Ill. 2d 104, 174 N. E. 2d 182.

[2] People ex rel. Callahan v. GM&O RR. Co., 8 Ill. 2d 66, 132 N. E. 2d 544 and CB&Q RR. Co. v. Dept. of Revenue, 17 Ill. 2d 376, 161 N. E. 2d 838.

Act of 1939 as amended, alleging that the operating property of the railroads was annually assessed at its full fair cash value whereas the value of locally assessed property, representing approximately 95% of taxable property in the county, was debased to levels averaging 50% of full value during the years 1957 to 1962. The railroads sought refunds of protested taxes to the extent that the taxes paid exceeded the amount which they would have been required to pay if all property had been assessed and equalized to the level of 100% of full fair cash value as required by statute.

The pending valuation objections of all of the railroads were consolidated for trial and by stipulation entered into by all of the parties, it was agreed that:

> "The said Objectors have each objected to taxes levied upon its railroad property in Madison County, Illinois, for the several years for which their objections are pending and have been consolidated for trial in this proceeding, because of **the alleged unlawful discrimination resulting from the alleged debasement of equalized assessed valuations of locally assessed property in Madison County for each of said years and the alleged equalized assessed valuation of such railroad properties at full fair cash values, and that this consolidated case is to be tried upon said objections,** without said causes being merged and with the maintenance of separate dockets and with separate final orders in all cases at the conclusion of the trial proceedings."

After a lengthy trial and consideration of voluminous testimony and exhibits, the trial court found that locally assessed property had been debased to levels varying from 48.14% to 51.4% during the years in question and that the railroads had likewise been assessed at less than full value but at levels so much higher than local property that it constituted constructive fraud entitling the

railroads to a refund of only a portion of the taxes paid under protest. The judgment order of the trial court expressly reserved jurisdiction of the court to approve the refund computations and implement the process of refund and distribution of the monies in the tax protest fund. The court added "there is no reason for delaying the enforcement or appeal of this order, judgment and decree."[3]

The railroads perfected a direct appeal to the Illinois Supreme Court only with respect to the trial court's determination that their operating properties had been assessed at less than full value. No cross appeal was taken on behalf of the collector and therefore the findings of the trial court regarding the debasement of locally assessed property are now undisputed. The Illinois Supreme Court concluded that the trial court proof established "assessments of the railroads at substantial full value and that the objectors are entitled to the refunds prayed for rather than refunds fixed by the trial court, which in each case was to be computed upon the straight average formulaic result without application of the judgment factor."[4]

STATUTES INVOLVED.

The Constitution of the State of Illinois, 1870, Article IX, Section 1, states in part (Ill. Rev. Stat., 1965, p. 21):

> "The general assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property—

---

[3] The form of findings and judgment order of the trial court are set out in Appellant's Jurisdictional Statement, Appendix B, p. A-87.

[4] People ex rel. Musso v. CB&Q RR. Co., 33 Ill. 2d 88, 102, 210 N. E. 2d 196, 203.

> **such value to be ascertained by some person or persons, to be elected or appointed in such manner as the general assembly shall direct, and not otherwise; * * *"** (Emphasis added).

The Illinois General Assembly has enacted provisions in the Revenue Act of 1939, as amended, to implement the foregoing requirements by delegating to the Department of Revenue the authority and responsibility for assessing railroad operating property and certain other types of property, and for equalizing the assessments of all other real estate and personal property assessed by various local officials. The uniformity provisions of Article IX, Section 1, have been carried out in various sections of the Revenue Act which specifically require that all real estate and personal property, both locally assessed and state assessed, be valued for tax purposes at fair cash value. If local assessing officials fail to assess at full fair cash value, the Department of Revenue is empowered to certify to the county clerk an appropriate multiplier to raise the level of assessment of locally assessed property to 100% of full value.[5]

The method of determining the fair cash value of railroad operating property, except non-carrier real estate, is prescribed in Section 80 of the Revenue Act (Ill. Rev. Stat. 1961, c. 120, par. 561). The Department is required to consider the actual or market value of stock and debt and the net earnings of the company over the preceding five years, "and such other information as the Department may consider as bearing on the fair cash value of the property" (which has included reproduction cost of property having a situs in Illinois together with other matters affecting their judgment of value).

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[5] Ill. Rev. Stat. 1961, c. 120, pars. 501, 502, 561, 612, 627 and 632.

ARGUMENT.

POINT I.

No Question Respecting the Constitutionality of a State Statute and No Federal Statute Is Involved.

As stated in Appellant's Jurisdictional Statement, these appeals merely question whether the action of the Illinois Supreme Court in applying the Illinois laws to the facts in these cases violated provisions of the Fourteenth Amendment to the federal Constitution and no claim is made by Appellant that the state laws *per se* are repugnant to the Constitution or laws of the United States. Thus no grounds exist for direct appeal to this Court under Section 1257 (1) and (2) of the Judicial Code of 1948 [28 U. S. C. A., Sec. 1257 (1) and (2)].

POINT II.

No Substantial Federal Question Is Involved.

The people raise only an evidentiary question.

Despite the fact that the record, exhibits and briefs in these cases are voluminous, there was but one issue on which the Illinois Supreme Court was required to pass:

> "The only issue, therefore, is whether the railroads' properties were assessed at full, fair, cash value for the years in question. This should involve only a question of fact to be viewed in the light of the law as developed and crystallized through a succession of these cases." (People ex rel. Musso v. CB&Q RR. Co., 33 Ill. 2d 88, 90.)

The premises of the People's four jurisdictional questions are (a) arbitrary action by the Court in judicially

finding railroad values through the use of judgment or (b) such arbitrary action by the Department of Revenue which the Court approved, and (c) mandating "complete reliance" on the inflated prices of the post World War II economy in equalizing non-railroad property. The common denominator in each alternative is complete lack of evidentiary support "in the record or elsewhere" for the findings of value. The use of judgment in the railroad evaluation process is repeatedly equated with the elimination or disregard of inflation. The mandatory use of inflated values in equalizing non-railroad property is equated with the official sales-assessment ratio studies.

It is axiomatic that if the record shows the findings were at the full fair cash values and had evidentiary support, the action was not arbitrary and there is here presented no federal question to support certiorari jurisdiction, and in the absence of creditable evidence to the contrary, the presumption of statutory compliance would provide adequate support to a finding of full value.

The appropriate procedures, methods and standards to be followed in determining railroad valuations for purposes of ad valorem taxation in Illinois are strictly State questions and the State Constitution and statute have assigned these functions under statutory guide lines to the Illinois Department of Revenue.

Whether the Department's findings of value in fact represented the full fair cash values of the subject railroad properties required by statute or whether through the use of spurious judgment such valuations were, in fact, reductions from full values are evidentiary questions which the Illinois Supreme Court was competent to decide with finality, unless there was neither presumption nor evidence to support the Court's decision. It is respectfully suggested that only if there is no evidence to

support the findings and creditable evidence against them of a kind and quality sufficient to overcome the presumptions of statutory compliance, should this Court find that inequality or lack of due process are presented by this record.

The task of searching the record for and of analyzing and weighing conflicting competent evidence relating to the forty-six findings of taxable railroad valuations made by the Department upon which the 46 appealed judgment orders of the Illinois Supreme Court are based is not a federal, to say nothing of plenary, problem.

We further respectfully suggest that the record contains a great deal of creditable evidence directly and overwhelmingly establishing that the Department performed its function in good faith and assessed the railroads' properties at their full fair cash valuations. Appellees have filed with the Clerk of this Court nine copies of their principal brief, Reply Brief and motion to strike the People's second brief, which was taken with case.

The analysis of the evidence, contained in Appendices C, F and G, which follows this motion, clearly shows the railroads did not enjoy the benefits of any general inflation during the years of 1957 through 1962.

Appendix D shows the selling prices and the assessed valuations of six railroads which changed hands in the 1949-1961 era. Five of the roads were independent Class I, long-haul railroads. One was a belt line. In all but one of the transactions, the assessment exceeded the selling price. In the single exception, the assessment was 99% of the selling price.

Appendix E shows the comparative influence given reproduction cost in the straight average formula which the Department used in its approaches to findings of taxable railroad valuation, between 1957

and 1962. Reproduction cost would have thus been given an influence under the formula in 1962 in the case of the C&NW of 74.8%, of the Pennsylvania of 75.31% and the New York Central of 72.25%. These percentage figures represent the number of dollars which would have been accorded the reproduction cost indicator of value in the valuation of the railroads if the formulaic results, which the trial Court adopted as the full fair cash value of the properties, were adopted. Graphs illustrating this absurd result from the rigid adherence to the formulaic approach in 1963 are also in the record (Objectors' Exhibits 104A and B, A. V. II, pp. 223, 224).

Appendix H is a table demonstrating that there existed no "hold the line" policy benefiting railroads. This analysis is predicated upon the exhibits of both parties, and the reflected analysis has not been questioned since its submission to the Illinois Supreme Court.

Appendices I and J are graphic portrayals of the fluctuating levels of assessment of all major Class 1 railroads from 1938-1962 and of each of the objecting railroads who here appear. The scale in every instance is that used in People's (Collector's) Exhibit No. 69 (A. V. II, p. 310).

"Part 1, Railroads, Transport Statistics in the United States," for the year ending December 31, 1962, which appears as People's (Collector's) Exhibit 109, clearly indicates that the railroads did not participate in the benefits of the inflation during the subject period, because from 1952 to 1962—

1) Mileage owned and operated by all railroads declined from 222,508 to 215,090 and the mileage of Class I line-haul railroads declined from 212,838 to 205,216. (p. 3)

2) Freight carrying cars owned by Class I line haul railroads declined from 1,758,933 to 1,550,067 (p. 23). It

may be noted that during this period, privately owned freight cars also declined from 274,472 to 269,475 (p. 22). In the Eastern District, which embraces most of Illinois, the decline was from 713,979 to 536,080. (p. 23)

3) In the same period, passenger train miles declined from 34,767 to 24,248 (p. 24) and total passenger cars owned by railroads declined from 17,257 to 11,166. (p. 25)

4) As might be expected, traffic statistics were parallel or had an even greater decline. Total revenue passengers carried (thousands) declined from 469,537 to 311,739 and those carried one mile or more declined 48.97%, from 34,009,986 to 19,902,201. (p. 30)

5) Total freight tonnage (thousands), both carload and LCL, declined from 1,382,604 tons to 1,233,597 tons, only the products of agriculture showing an increase of 16,800 tons in the last year over first of the period. (p. 31). There were 19,826,704,266 freight train, loaded car miles operated in 1952 and only 17,013,664,254 in 1962. (p. 42)

It is obvious that whatever was happening to the remainder of the economy during this period in the general inflationary process following World War II, the railroads were not participants (Col. Exhs. 108 and 109). Had inflation affected railroad valuations, it would have been reflected in the market prices of stocks and bonds and capitalized income.

Cost Was Never Accepted as Reliable.

The People have predicated their entire case, both in the trial and Supreme Courts of Illinois and in this Court, on the hypothesis that cost was a time-honored essential in an even-weighted 3-part equally weighted formula, both historically and under the provisions of the statute, and that by "judgment" only lately applied, cost has been practically eliminated. This is simply not the case. Not only does the statute not require its consideration in the

evaluation process, but the Illinois Tax Commission in determining the procedures for the evaluation of railroads, evolved in the 1933-1937 era, and since followed by both the Commission and the Department, looked askance at reproduction cost as a reliable indicator of railroad value, while recognizing its usefulness in the allocation factor.[6]

The Illinois Tax Commission itself sponsored the Railroad Assessment Act of 1937 (Collector's Exhibits 36, 37 and 38, A. V. II, pp. 283-291). This Act was incorporated in toto and without significant changes in Sections 80 to

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[6] The Commission stated in its 15th Annual Report covering the year 1933 as follows:

> "Primary emphasis, it is believed, should be given to earnings and stock and bond quotations in the valuation process. It is felt that these are a better reflection of the current market value of a railway than original cost. * * *
>
> "Up until the time when valuation appraisals were made by the Interstate Commerce Commission, few railroads had data on original costs. Now such information as they have is based on these appraisals, together with records of additions and betterments to date; **but even these records are far from satisfactory.**
>
> It is almost axiomatic that original costs are no measure of present values. The costs of reproduction have much more relation to actual values, **but if an operating railroad owns numerous useless facilities, the cost of reproduction is far from satisfactory. In an allocation factor in which mileage prorates and earnings data are employed, reproduction values seem to find a logical place. Their use for allocation purposes does not imply that they are being used for the purpose of determining the system values of the railroads in question. These values, as was explained above, are determined on the basis of earnings, stock quotations, and such weighting of physical appraisals as appears necessary to produce satisfactory valuations.** In allocation formulae, however, reproduction values give weight to the presence of facilities within a state." [Ill. Tax Com., 15th Ann. Rep. People's (Collector's) Exh. 34, A. V. II, pp. 281 and 282.]

In mentioning adjustments in the following years, changes in the RPCN (LD) was not mentioned. [Ill. Tax Com., 17 Ann. Rep. People's (Collector's) Exh. 36, A. V. II, p. 283.]

87 of the 1939 Revenue Act and its provisions have from then been in force. There is included in the appendices to this brief the pertinent sections of the Illinois Constitution and the 1939 Revenue Act as in force since its adoption. The 1963 amendments to Sections 80 and 86 (App. D, Jur. St., p. A-50) have no present significance. The important thing is that Section 80 as it now appears and as contained in the 1937 Railroad Assessment Act shows that neither the Illinois Tax Commission nor the legislature considered reproduction cost as an indicator of railroad value which must be considered with income and market indicators, which the railroad assessor is required to consider. Cost is simply one of the items that may be looked at with the 5-year averages of capitalized income and stock and debt, and this was the decision in the **C&NW Valuation** case. (C&NW Ry. Co. v. Dept. of Revenue, 6 Ill. 2d 278) Insofar as the provisions of the Act are concerned, the only required use of the reproduction cost information, as annually reported by the railroad, together with much other information, is as a component of the formula by which the allocation factor is determined for the apportionment of income and stock and debt values. (Chap. 120, §565).

After the adoption of the 1937 Railroad Valuation Act, the Commission again noted that the reduced income and market indicators required a further adjustment of railroad valuations without mentioning cost.[7]

The Commission for the first time in 1940 reported the technical revolution then well advanced in the transporta-

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[7] "Long-continued and increasingly aggravated financial difficulties of the railroad industry, reflected in lowered company earnings and in the market values for stocks and bonds, necessitated the reduction in the full values of their operating properties." [Pp. 15-16, 19th and 20th Annual Reports of the Illinois Tax Commission. People's (Collector's) Exh. 37, A VII, p. 285.]

tion industry and the resulting economic obsolescence of railroad property as a result of the shift of large segments of railroad traffic to other new and expanding forms of transportation. The Commission then observed that it was

> "inevitable that the contraction in the physical plant, the precipitous falling off in earning capacity, and the disposition of investors to discount heavily the prospective earnings of the railroad industry should have made for a more rapid decline in railroad assessments than in the assessment of other types of property."

And discussing the effect of this revolution upon the assessment process, the Commission observed:

> "The elements that enter into the determination of the value of a particular property by an assessment agency are often difficult of analysis. Past earnings, the cost and condition of the property, the imputed value that the stock market places upon securities, general economic tendencies and the level of the previous year's assessment combine with the experience and individual knowledge of members of the Commission to affect their judgment. Mr. Justice Holmes has described the process by which valuations are arrived at: '. . . they express an intuition of experience which outruns analysis and sums up many unnamed, tangled impressions which may lie beneath the consciousness without losing their worth.' * * *
>
> "All through the process of determining an assessment the necessity for utilizing judgment arises, and in the final summary the 'tangled impressions' act directly upon the result. Formula assessments are not mechanical unless rules are developed to cover every possible contingency, a situation which is incapable of attainment." [21st and 22nd Annual Re-

ports of the Illinois Tax Commission, People's (Collector's) Exhibit 38, A. V. II, 288, 289).]

Considering the use of judgment in the valuation of the operating property of a railroad this Court reached the same conclusion as the Illinois Tax Commission:

> "The ascertainment of the value of a railway system is not a matter of arithmetical calculation and is not governed by any fixed and definite rate. Facts of great variety and number, estimates that are exact and those that are approximations, forecasts based on probabilities and contingencies have bearing and properly may be taken into account to guide judgment in determining what is the money equivalent—the actual value—of the property."
>
> Rowley v. Chicago & N. W. R. Co., 293 U. S. 102, 109; Rehearing denied 293 U. S. 632.

It cannot be said, since their own exhibits are to the exact contrary, that the exercise of judgment by an assessor, considering exactly the things to which assessors Danis and Koncel testified they gave consideration, was arbitrary. Nor can it be contended that the recognition by the Illinois Supreme Court of the exercise of judgment as an appropriate lawful final step in the approach to the evaluation of a railroad was unsupported by substantial evidence.

The court did not mandate the following of inflationary trends.

The Department performed its equalization functions upon the facts disclosed by sales—assessment ratio studies. These official ratio studies reflected the level of assessments and equalized assessment of a given county for the year surveyed, and have been found by the Illinois Supreme Court to truly reflect the ratios of assessed and equalized assessments to the full fair cash value and the

opinions in **Hillison, Kohorst** and **Wenzel** describe how they are conducted and show them to be free from criticism as to method and to comply with the statute. No question was raised in the lower Courts as to the method of conducting the official ratio studies or their results, and the People accepted the findings of the trial Court that the levels of assessment for each of the subject years of locally assessed property, after equalization, were those found by the Department.

Undoubtedly, many properties surveyed did increase in value and the sellers participated in the benefits of inflation insofar as the sale prices of their properties were concerned. But, it does not follow that all other properties which sold were thus increased in value, and in any case, it is clear that if the inflated properties had achieved a higher taxable value as a result of the economic circumstances affecting their selling prices, there was nothing arbitrary in the giving of effect to the higher values measured by such sale prices in the equalization process, as the statute required, in determining the county wide level of assessment.[8] The department did not by this procedure mandate complete reliance upon inflated prices. Nor did these studies tend to show that railroads were increasing in value through the inflation which may have affected non-railroad property, and the record shows they did not participate.

Neither Was Railroad Property Arbitrarily Assessed.

Railroad property is centrally assessed by the Illinois Department of Revenue on the "unit" basis. A unit as-

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[8] As to method of conducting the official ratio studies, see *Hillison*, 22 Ill. 2d pp. 96-8; *Kohorst*, 22 Ill. 2d pp. 109-111; *Wenzel*, 28 Ill. 2d pp. 212-16. For standards of value of locally assessed property, see Sections 501 and 502, Chapter 120, Annotated and Ill. Rev. Stat., App. B.

sessment is an evaluation of all the railroads' operating property, including funds involved in operations and all other operating personal property, and, in case of an interstate carrier, its apportionment between Illinois and the other situs states by the application of an Illinois allocation factor. In the approach to an assessment, this allocation factor is applied only to the statutory value indicators of income and market, which the Department is required to consider. These allocated amounts are, in themselves, guides to the assessment and as a further guide are averaged on a ⅓, ⅓, ⅓ basis with I. C. C. reproduced cost less depreciation of the Illinois property of the railroad, adjusted to eliminate uneconomic property and physical obsolescence. Economic obsolescence is not adjusted out of the reproduction cost factor before its use in the formula. The formulaic result is then considered with the statutory factors and with all other information available to the assessor, who then determines by the exercise of judgment based upon his experience what the taxable value, i. e., the assessment, of the railroad is for the subject year. Railroad assessors Danis and Koncel both testified unequivocally that the railroad assessments were at full fair cash value. The reduction from the formulaic result which usually results from the application of the judgment of the assessor is referred to as the "judgment factor". The valuation so determined is distributed by the Department on a pro-rated mileage basis to all of the Illinois taxing districts in which the railroads' operating property is located.

The Illinois Supreme Court has repeatedly found that the method pursued by the Department was not arbitrary and complied with the statute. It could scarcely do otherwise.[9]

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[9] Musso, 33 Ill. 2d 88, 97; Korzen, 32 Ill. 2d 554. In the exercise of his final judgment, the assessor anticipated the future,

The Nature of the Case—Constructive Fraud.

The subject tax objections were based on the Callahan case.[10] **Under Callahan, there resulted constructive fraud**

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paid most attention to earnings, and considered economic obsolescence and many other things, such as, the trends upward and downward of operating income and of stock and debt prices, some based upon observation and others, including current economic conditions. In Illinois, the income and market factors have always been considered more reliable than cost, either investment or reproduction. The principal guide of Raymond S. Danis, as railroad assessor for the years 1933-1960, inclusive, was the capitalized earnings of a railroad, which was historical. Danis' procedures were followed by his successor, railroad assessor Edward F. Koncel (1961-1962) (Danis A 1, pp. 222-3, 228-30, 407-12; Koncel, A 1, 425, 427-430, 433).

See *C&NW Ry. Co. v. Dept. of Revenue,* 6 Ill. 2d 278, 128 N. E. 2d 722; *CB&Q RR. Co. v. Dept. of Revenue,* 17 Ill. 2d 376, 161 N. E. 2d 838. And see People's (Collector's) Exhibit 34, A. V. II, pp. 281-2 and 1959 testimony of Raymond S. Danis in previous Madison County tax cases. He was then railroad assessor and a witness for the People, A. V. I, pp. 402-415. Danis testified again in Lee County in 1960 while the incumbent assessor, as adverse witness to the railroads, A. V. I, pp. 281-291. After retirement, Danis was a witness in this case, A. V. I, pp. 218-235. Edward F. Koncel testified as Court's witness in the case while the incumbent railroad assessor, A. V. I, pp. 415-441.

[10] *People ex rel. Callahan v. GM&O RR. Co.,* 8 Ill. 2d 66, was the first tax objection case considered by any Illinois Court after the effective date (1-1-46) of the full value (Butler) Reform Legislation of 1945. In this case the GM&O objected to 45% of the taxes levied upon its property in Madison County for the year 1951 claiming it had been assessed at full fair cash value as the statute required while other property subjected to the same taxes in Madison County had been assessed that year at not to exceed 55% of full fair cash value as the law required. The railroad sought to be refunded the difference between the amount of tax extended against its property and what the tax would have been had the tax base included locally assessed property at 100% of the full statutory standard. This was in effect a new remedy and based upon the statute as amended in 1945. The Illinois Supreme Court held the objection to be appropriate, but the particular form to be technically objectionable. Subsequently, other similar objections to taxes levied for the years 1952-1957, inclusive, in Madison County were amended or pleaded to meet the technical objection of the Court in *Callahan,* and were consolidated and tried, vigorously and comprehensively, over a 16 months period. These objections were sustained and the final orders, all in similar

as a matter of Illinois law, without regard to any provision of the Illinois or federal Constitutions. It evolved as a remedy for the beleaguered taxpayer to whom the 1945 full valuation reform legislation had been faithfully applied while other taxpayers had not been similarly affected. From these facts constructive fraud was irrebutably presumed.

It is significant that in none of the cases in which relief was granted upon the basis of **Callahan** does the Court find that, by the relief granted, it is achieving uniformity under the Constitution of Illinois or due process or equal protection under the 14th Amendment.

In the **Burlington Valuation** case, 17 Ill. 2d 376, the railroad sought to compel the Department to exercise its constitutional duty to secure uniformity in the assessment and equalization of the 1957 assessment of the railroad. The Supreme Court held that "with the enactment of the Butler amendments to the Revenue Act in 1945, the General Assembly required that all valuations upon which tax rates are extended must be at full, fair cash value. It is the duty of the Department to carry out the statutory mandate". The Court then referred the railroad to **Callahan** as providing an appropriate remedy for the recovery of any excess taxation due to the gross discrimination complained of by the railroad.

While several of the Objectors linked their rights to relief under **Callahan** with their right to be protected by the 14th Amendment and uniformity clause of the State Constitution, the facts alleged and the relief prayed in every instance were the same in substance as the Illinois Supreme Court had approved in **Callahan.** The railroads in all proceedings in the trial Court and on appeal pro-

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form, were entered on November 3, 1959. (See Objectors' Exhibits 46, 46A-E, A. V. II, pp. 143-159.)

ceeded upon the simple issue of constructive fraud. (A. V. I., pp. 4-7, 47-8, 66-7, 71.)

It follows that, so far as the remedy is concerned, this case does not draw in question the validity of any Illinois statute on the grounds of its being repugnant to the Constitution, nor does the remedy involve a single substantial federal question. It is entirely and adequately based upon well-settled non-federal grounds, namely, the provisions of the 1939 Revenue Act of the State of Illinois, as amended in 1945, requiring the assessment and equalization of railroad and of all other property at full fair cash value, and specifying the means for equalizing locally assessed property at that value, and the subsequent violation of the statute in the assessment and equalization of locally assessed property at less than 50% of statutory standard, and the resultant constructive fraud.

Public Importance Greatly Exaggerated.

Counsel for the People, without documentation, have claimed a great public interest impels the acceptance of this case upon a "probable jurisdiction" basis (Jur. St. at pp. 20-21, 37-41). The Appellees have presented valuation objections similar to those in the case at bar in more than half of the 102 Illinois counties. The amounts involved in Cook County for the railroads located there more than equal the total valuation objections in all other counties, including Madison. Based on **Korzen**, the Cook County objections have now been finally disposed of, or are awaiting submission of orders making final disposition. Based on **Callahan, Hillison, Kohorst, Wenzel** and **Enrietta**, most of the other valuation objections of Appellees have also been disposed of in the Counties of Illinois other than Cook.[11]

[11] CB&Q, total counties in which objections filed 45, objections disposed of 43, still pending, 2; and similarly, C&NW, 30, 26, 4;

POINT III.

The Judgments Appealed Lack Finality.

A fundamental prerequisite to a review by this Court of a state court decision either on appeal or by writ of certiorari under the provisions of Section 1257 of the Judicial Code of 1948 (28 U. S. C. A., Sec. 1257), is that the judgment to be reviewed be final and the litigation concluded in the court of first instance.

The trial court originally reserved jurisdiction to approve the refund calculations and the mandates of the Supreme Court of Illinois direct that further orders be entered by the trial court awarding refunds to the objectors in conformity with the method outlined in the **Hillison** and **Kohorst** cases previously decided by that court. To carry out the mandates requires more than a mere arithmetical calculation of the excess taxes and is not just a ministerial task such as an accounting. On November 2, 1965, the railroads filed motions requesting the Circuit Court of Madison County to enter the final orders as directed, and have tendered proposed settlement orders which have not been entered as of the date of this writing. A substantial and fundamental dispute between the parties has existed from the outset of this litigation regarding the proper method to be used in determining the amounts of protested taxes to be refunded and the

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GM&O, 25, 21, 4; C&EI, 23, 20, 3; I. C., 53, 50, 3; N. Y. C., 32, 29, 3; N. Y., Chicago & St. L., 17, 10, 7; Pa., 17, 15, 2; Wabash, 23, 18, 5; Ill. Term. 10, 8, 2; TRRA, 2 1, 1; A&S, 2, 1, 1.

In some of the counties where objections are still pending, the earlier years had been disposed of and the objections pend only for one or more of the last years in the period. Only the C&NW has valuation objections pending to 1963 taxes, and this objection is *pro forma* based upon a 30% reduction by the Department of Revenue in the 1963 assessed valuation, prior to equalization, as provided by the 1963 Amendment to Sections 80 and 86 of Revenue Act. See App. D, Jur. St. p. A-50. This objection is undisposed of in only 3 counties.

opinions in the **Kohorst** and **Hillison** cases are not sufficiently specific to enable the trial court to carry out the mandates without the exercise of judicial discretion.[12] The collector contends that the revised tax to be charged the railroads in each taxing district should be computed by dividing the amount levied by the adjusted full valuation, whereas the railroads argue that the **Kohorst** and **Hillison** cases require use of the amount actually extended, which, in most instances, is considerably less than the levy as the result of maximum tax rate limits. The proposed levy theory involves a hypothetical recast of the tax bill of all taxpayers in each taxing district, but such revised bill can only be enforced against the railroad objectors since the taxes extended against the other taxpayers may not now be altered. The relief granted the railroads by the Illinois Supreme Court will be defeated in many of the taxing districts where the rate needed to produce the amount of the levy will equal or exceed the rate originally extended thereby creating a new discrimination against railroad property. The railroads will also be deprived of an opportunity to raise objections to the recast tax bills in violation of due process and equal protection of the laws. Considering the issues involved in this dispute, a federal question may evolve if the trial court accepts the "levy" theory and further appeals to the Illinois Supreme Court and possibly this court will ensue.[13]

This court has said (**Republic Natural Gas Co. v. Oklahoma**, 334 U. S. 62, 68, 98 L. ed. 1212, 1219):

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[12] In People ex rel. Kohorst v. GM&O RR. Co., 22 Ill. 2d 104, 112, 174 N. E. 2d 182, the measure of recovery is stated to be "the difference between the amount of taxes **extended** against the objectors and the amount which would have been **extended** had the locally assessed property been equalized at 100% full, fair cash value." (Emphasis added.)

[13] Nine copies of one of the records of proceedings in the trial court since the filing of the mandates have been filed with the clerk of this court.

"the requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up—for example, where liability has been determined and all that needs to be adjudicated is the amount of damages. Bruce v. Tobin, 245 U. S. 18, 62 L. ed. 123, 38 S. Ct. 7; Martinez v. International Bkg. Corp., 220 U. S. 214, 223, 55 L. ed. 438, 443, 31 S. Ct. 408; Mississippi C. R. Co. v. Smith, 295 U. S. 718, 79 L. ed. 1673, 55 S. Ct. 830."

There has been no final, effective determination of this litigation in the state courts. In furtherance of good judicial administration, a fragmentary review of these cases should be avoided by dismissing the appeals for want of finality.

CONCLUSION.

It is respectfully submitted that this Court "will not undertake to review what the lower Court did not decide." **Walters v. St. Louis** (1954), 347 U. S. 231, 233, 98 L. Ed. 660, 74 S. Ct. 505.

The constitutional questions hypothecated by counsel were not the subject of nor involved in the opinion of the Illinois Supreme Court. These cases are founded upon the 1939 Revenue Act of Illinois and arise from tax objections filed under that act founded upon constructive fraud resulting as a matter of Illinois law from the violation of that act by the Department in the equalization of locally assessed property.

The only issue reviewed by the Illinois Supreme Court was the assessment of railroad operating property at full value, an evidentiary matter, adequately supported by the record, and concluded favorably to railroad objectors. It

seems apparent that no federal question is involved and that the judgments below are lacking in the finality required to support the jurisdiction of this Court.

Wherefore, Appellees in this Court respectfully pray that this appeal be dismissed or that the judgment of the Supreme Court of the State of Illinois be affirmed.

Respectfully submitted,

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APPENDIX A.

Opinions of Illinois Supreme Court in Earlier and Concurrent Companion Cases.

Callahan. *People ex rel. Callahan v. Gulf, Mobile and Ohio Railroad Company,* 8 Ill. 2d 66, 132 N. E. 2d 544.

This was the initial tax objection case following the Butler Full valuation reform legislation of 1945, and was based upon the full valuation of railroad property by the Department, absent the power of equalization to reduce railroad full value assessments to assessment levels of locally assessed property. The railroad appealed from an order striking the objection based upon the discrimination under the statute between the full value assessment of the railroad and a less than 55% level of assessment of locally assessed property. The right to the remedy was questioned by the People.

> "The parties agree, as indeed they must, that the Revenue Act requires all valuations upon which tax rates are developed and extended to be at full, fair cash value (Ill. Rev. Stat. 1951, chap. 120, pars. 501, 502). By its stricken objections, appellant, whose property was assessed at State level along with other railroads, alleged that its own property has been assessed at full, fair cash value but that it had been excessively and illegally taxed when locally assessed property in the county was fraudulently and intentionally undervalued at less than full, fair cash value. * * * Appellant objected against paying taxes on rates higher than would have been developed if locally assessed property had been at one hundred percent full, fair cash value in the taxing formula by which rates were computed. Translated into figures, it is appellant's contention that because locally assessed property was fraudulently and intentionally valued at less than full, fair cash value, the resulting increase in rates caused its tax bill of $45,017.81 to be excessive by $18,578.38.
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> "Some question is raised as to whether appellant, who admits that its own property was correctly assessed, has pursued the proper remedy. We find, however, that this court has observed on several occasions that since valuations must be the result of honest judgment and not of mere will, it follows

that an assessment may be impeached both when fraudulently made at too high a rate, and when fraudulently made at too low a rate. (*People's Gas Light and Coke Co. v. Stuckart*, 286 Ill. 164, 174; *Chicago, Burlington & Quincy Railroad Co. v. Cole*, 75 Ill. 591, 594.) Further, in a long line of cases, it has been held that the question of discrimination in assessments may properly be raised on an application for judgment for delinquent taxes. (See: *People ex rel. Ross v. Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*, 381 Ill. 58, 61, and cases there cited.) Here the essence of appellant's objections is that there was a fraudulent discrimination resulting from the undervaluation of locally assessed property which had the effect of denying appellant equal protection of the Revenue Act, and of subjecting it to taxation lacking in both constitutional and statutory uniformity. We conclude that a proper remedy has been pursued" (pp. 67-69).

C&NW 1953 Valuation Case. *C&NW Ry. Co. v. Dept. of Revenue*, 6 Ill. 2d 278, 128 N. E. 2d 722, Certiorari denied 351 U. S. 950. Rehearing denied 352 U. S. 859.

In this case, the railroad contended that its assessed valuation exceeded the full fair cash value of its property, and complained of the use of reproduction cost in the formula and the use of judgment in reducing the formulaic result by a smaller percentage in its valuation than in the valuation of 41 other railroads, since the basis of the judgment reduction was not disclosed, although the railroad had sought such disclosure in the examination of the railroad assessor, Raymond S. Danis.

"Plaintiff also appears to suggest that a discrimination has occurred with respect to the Department's practice in setting its final assessment at a figure which is lower than the figure produced by its formula. In plaintiff's case there was a reduction of $10,980,000, about 11 per cent. Forty-one of the other railroads received reductions which were larger percentagewise. The remaining lines received smaller reductions. The record does not disclose the basis for these reductions, either in plaintiff's case or in the case of other railroads. A difference not shown to be the result of caprice or intentional discrimination is not enough to invalidate the assessment. (*Cf. Department of Revenue v. Warren Petroleum Corp.*, 2 Ill. 2d 483, 488.) Plaintiff points out that as a result of the various reductions the final assessment of thirty-seven of the lines is a figure approximately equal to, or less than, the figure which

would have been obtained had the Department ignored reproduction cost in its formula. The implication, which is not expressly drawn by plaintiff, is that the Department, under the guise of making a reduction in assessments has in fact applied to railroads other than the plaintiff a formula based only on capitalized earnings and security prices. From what we have already said it is clear that this charge must be rejected. It is unsubstantiated in the record before us, and the reductions made by the Department may well rest on reasonable, though undisclosed grounds" (pp. 289-290).

Burlington 1957 Valuation Case. *CB&Q RR. Co. v. Dept. of Revenue,* 17 Ill. 2d 376, 161 N. E. 2d 838. The formulaic average had been reduced from $195,183,000 to $147,000,000, which the railroad contended was excessive. The Burlington contended that the Department should equalize this valuation further to conform to the state-wide average level of assessment of locally assessed property.

"Plaintiff is an interstate railroad operating in 12 States. In determining the 1957 assessed value of its Illinois operating property, the Department took into account: (1) the capitalized value of the average of net system railway operating income for the past five years; (2) the market value of stock and debt, using a five-year average; (3) the cost of reproduction less depreciation of physical property located in Illinois. An allocation fraction was then applied to the first two items to determine the portion of the total system value represented by Illinois assets, and a judgment factor was used which substantially reduced the average of the three items. This method of valuing railroad operating property is used in assessing all railroads in Illinois, and it complies with the statutory requirements. *Chicago and North Western Railway Co. v. Department of Revenue,* 6 Ill. 2d 278" (p. 379).

Pointing out that the 1945 Butler Reform Legislation had terminated the previous authority and duty of the Department to equalize and thus secure uniformity under Sec. 1, Art. IX, of the State Constitution (or equal protection and due process under the State and Federal Constitutions), the Court found that the Department could not assess or equalize railroad property at less than the statutory standard of full fair cash value, and confirmed the remedy of tax objection to meet the alleged discrimination as approved in **Callahan.**

"What the court referred to as the "recognized custom" of the State Board of Equalization and the Tax Commission in prior years, to debase or equalize assessed valuations of railroad operating property below full value in order to achieve uniformity with local assessments, is no longer permissible under the Revenue Act. Compare Ill. Rev. Stat. 1937, chap. 120, par. 56.8, in effect when *Mobile and Ohio Railroad Co. v. Tax Commission*, 374 Ill. 75, was written, with Ill. Rev. Stat. 1955, chap. 120, par. 567. With the enactment of the Butler amendments to the Revenue Act in 1945, the General Assembly required that all valuations upon tax rates are extended must be at full, fair cash value. It is the duty of the Department of Revenue to carry out the statutory mandate. Assessments made by the Department must be at full value (Ill. Rev. Stat. 1955, chap. 120, pars. 502, 561) and local assessments must be equalized by the Department to full value by increasing or reducing the aggregate assessed valuations made in the several counties. Ill. Rev. Stat. 1955, pars. 627, 630.

"The Department, however, refused to consider the plaintiff's evidence on the ground that the hearing requested by the plaintiff was concerned with the Department's duty to assess the value of railroad operating property and not with its duty to equalize local assessments throughout the State to full value. We think the Department was correct. It has no authority to reduce its assessed valuation of the plaintiff's property to less than full value. And the time sequence prescribed by the Revenue Act for local assessment of property makes it unlikely that the various county equalization factors will have been determined at the time the Department is valuing railroad property. (Cf. Ill. Rev. Stat. 1955, chap. 120, pars. 581, 588, 591, 592, 609, 627, 629a; *People ex rel. Tennyson v. Texas Co.*, 406 Ill. 120.) But appropriate remedies are available if the plaintiff's property is in fact bearing a disproportionate share of the tax burden in some taxing districts. Plaintiff may petition the Department for a reconsideration of the equalization multiplier certified to a county clerk for application to local assessments. (Ill. Rev. Stat. 1955, chap. 120, par. 629a.) And such an objection may also be raised to a county collector's application for judgment and order of sale of its real estate. *People ex rel. Callahan v. Gulf, Mobile and Ohio Railroad Co.*, 8 Ill. 2d 66" (pp. 390-391).

Hillison. ***People ex rel. Hillison v. CB&Q RR. Co.*****, 22 Ill. 2d 88, 174 N. E. 2d 175.**

The Burlington here objected to 1958 taxes in Lee County, Illinois. Counsel for the People assisting the State's Attorney was the attorney for the State Depart-

ment of Revenue and also an Assistant Attorney General. Here the railroad pursued on its 1958 taxes the remedy of Callahan to which it had been referred by the Illinois Supreme Court in its 1957 valuation case, 17 Ill. 2d 391. The People contended that neither the uniformity clause nor the due process or equal protection provisions of the State and Federal Constitutions applied to require equity on the level of assessments, since railroad property could be properly assessed and taxed as a separate class, also, that, since the Department had, through judgment, debased its equalization factor to produce a level of assessment of less than 55% of full value for locally assessed property, the Court should assume that the reduction resulting from the use of judgment in the valuation of railroad property similarly produced a debased assessment from full value. The Court held that the discrimination complained of was founded upon the Illinois Revenue Act, as amended in 1945, and not on Constitutional grounds.

> "Before dealing with the main substantive question, it is necessary to dispose of one further argument of plaintiff. Plaintiff, relying on certain language in *People ex rel. Prindable v. Union Electric Co.*, 392 Ill. 271, argues that the constitution does not require railroad property to be assessed and taxed uniformly with other property, but that railroad property is a separate class, and that all that the constitution requires is uniformity within the class. Whether the legislature might constitutionally have provided for the assessment of railroad property at its full value while other property is assessed at only 55% of full value is not before us. The legislature has not so provided. The statute requires all property to be assessed at its full value, and the trial court found that the Department has failed to comply with the statute. It remains to be considered whether the findings of the trial court are supported by the evidence. * * * (p. 96).
>
> "The record shows that the Department, in assessing defendant's railroad property, initially computed the average of three factors which this court has upheld as properly bearing on the valuation of railroad property. (*Chicago and North Western Railway Co. v. Department of Revenue*, 6 Ill. 2d 278). These three factors are (1) capitalized value of earnings, (2) market value of stock and debt, and (3) reproduction cost, less depreciation, of the operating property located in Illinois. The average of these factors resulted in an initial

figure of $205,153,000. Thereafter, in the exercise of its "judgment factor," the Department arrived at an assessment of $147,000,000 for defendant's railroad property for 1958. Plaintiff argues, in effect, that if the ratio studies of the Department are to be accepted as indicating that locally assessed property was equalized at no more than 55% of full value, then the average figure of $205,153,000 should be accepted as the actual value of defendant's property, so that the final assessment of defendant's property at $147,000,000 represented only about 73% of its full value.

"This argument has considerable surface appeal, but we cannot agree with it as applied to the particular situation. In considering both the assessment of railroad property and the equalization of other property, there is an initial presumption that the Department complied with its statutory duty. Therefore, in the absence of evidence to the contrary, it will be presumed both that defendant's property was assessed at full value and that locally assessed property was equalized at full value. In the case of the locally assessed property the evidence presented by the defendant, including the ratio studies of the Department, was deemed sufficient by the trial court to overcome the *prima facie* presumption. No evidence was introduced by plaintiff. The trial court therefore found that locally assessed property was equalized by the Department at not more than 55% of full value. We believe the trial court was warranted in so finding (99-100).

"The valuation of railroad property poses a different problem. Here the concept of market value has little practical application. Since railroads are not bought and sold on the market, the legislature has provided that their fair cash value shall be determined by the Department of Revenue (Ill. Rev. Stat. 1957, chap. 120, par. 561), and reasonable discretion must be given to the Department in performing this task. The complex questions involved in assessing railroads have been the subject of recent litigation in this court. (*Chicago and North Western Railway Co. v. Department of Revenue*, 6 Ill. 2d 278; *Chicago, Burlington & Quincy Railroad Co. v. Department of Revenue*, 17 Ill. 2d 376.) We have approved the use by the Department of a consideration among other things of the three factors of (1) capitalized value of earnings, (2) market value of stock and debt, and (3) reproduction cost, less depreciation. The fact that these have been recognized as factors which may properly be considered by the Department in assessing railroad property, however, does not mean that the average of these three factors or any other formula making use of them will necessarily equal or will be presumed to be the same as their actual value. Since there is no presumption that the average of these factors, or $205,153,000, was the actual value of defendant's property, the fact that the Department finally assessed defendant's property at a lesser figure does not indicate that the property was assessed at less than its full value and

does not overcome the presumption that the Department properly assessed defendant's property at its full value" (pp. 101-102).

Kohorst. *People ex rel. Kohorst v. GM&O RR. Co., and C&NW Ry. Co.*, 22 Ill. 2d 104, 174 N. E. 2d 182.

The GM&O and C&NW railroads here appealed the decision of the Sangamon County Court overruling their objections to 1957 taxes based on **Callahan.** The case was submitted concurrently with **Hillison** and was decided on the same day. The availability of the remedy was under direct attack by the cross appeal of the People. The Court held the remedy to be based upon the Illinois statute, as amended in 1945, not the conformity or equal protection or due process guarantees, and rejected any implication of the debased value of the railroad property because of "judgment" in the Department's assessments of the complaining railroads.

"We are fully aware that relief by way of tax objection is a cumbersome and ponderous process. Nevertheless, it is a legal remedy available to objectors and they have seen fit to pursue it. We now turn to the question of whether they have sustained the burden of proving gross discrimination amounting to constructive fraud.

"In order to establish their case objectors must show the level at which their property and that of locally assessed property was assessed, and that the difference was grossly discriminatory and hence constructively fraudulent. We will first consider the assessment of the railroads' properties.

"It is the duty of the Department of Revenue to assess all railroad property, other than noncarrier real estate, at its fair cash value, (Ill. Rev. Stat. 1957, chap. 120, par. 561) and the several factors used by the Department to determine such value have been approved by this court. (*Chicago and North Western Railway Co. v. Department of Revenue*, 6 Ill. 2d 278; *Chicago, Burlington & Quincy Railroad Co. v. Department of Revenue*, 17 Ill. 2d 376.) The official reports of the Department state that objectors' properties were assessed at full, fair cash value, as do letters certifying the assessed values for the period of 1945 to 1957. There is a presumption of statutory compliance, and the testimony of Raymond S. Danis, railroad assessor of the Department, verifies the full valuation. There is no evidence in the record to overcome the presumption and

proof, and we must conclude that objectors' property was assessed at 100%. * * * (p. 109).

"In deciding the level to be used it must be borne in mind that this is not a case of equalization but is the seeking of a formula to provide a refund of discriminatory taxes" (p. 113).

Wenzel. *People ex rel. Wenzel v. C&NW Ry. Co.*, 28 Ill. 2d 205, 190 N. E. 2d 780.

The C&NW here pursued the remedy of **Callahan** in objecting to its 1956-1959 taxes in Macoupin County, Illinois. Here, although the railroad's valuations were attacked in the lower Court, the People conceded full valuation of railroad property in the Supreme Court and contested the procedures of the Department in the making of sales-assessment ratio studies. The Court held that the State itself was a nominal and interested party to the proceeding and could not be excused from a failure to produce any evidence in its files bearing upon the issue before the Court and rejected criticism of methods used by the Department performing its statutory functions.

"We recognize that most courts, as a condition for such exception, require that the mass of documents thus summarily received in evidence be placed in the hands of the court, or at least be made accessible to the opposing party in order that the correctness of the evidence may be tested by such inspection as is desired. (4 Wigmore on Evidence, 3rd ed., sec. 1230.) This condition was met here, particularly when we consider that the State, which is both the nominal and an interested party in tax objection proceedings, (*People ex rel. Murray v. City of St. Louis*, 297 Ill. 199, 201-202,) has at all times had the mass and volume evidence at its disposal. * * * (p. 213).

"At best the evidence shows two accepted methods by which the ratio between full and assessed value may be determined, each with its advantages and each with its disadvantages, and it is the decided weight of the evidence in this record that the sales-assessment method is the most widely accepted and used. Our statute requires only that the Department use such means as it deems 'proper and reasonable' to make its studies on assessed valuations, and a mere difference in opinion as to what is the best or most reasonable method is not sufficient to bring the matter within the range of judicial review. (Cf. *Schreiber v. County of Cook*, 388 Ill. 397, 311)" (p. 216).

Enrietta. *People ex rel. Enrietta v. GM&O RR. Co.*, 29 Ill. 2d 605, 195 N. E. 2d 174.

In this case, the GM&O pursued the remedy of **Callahan** in objecting to the 1958 discriminatory taxation of its property in Grundy County, Illinois. The People contested the full valuation assessment of the railroad on the basis of the testimony of two expert witnesses, each of whom pursued a different formula from that of the department and who also differed between themselves. Each gave the cost factor less than ⅓ weight and characterized the Illinois ⅓, ⅓, ⅓ formula as archaic, and neither applied judgment to his formulaic result. All of the official documentary evidence before the Court in the instant case on railroad valuations except the datum sheets of other railroads and for other years and the reports of the Illinois Tax Commission prior to 1939, was present in **Enrietta.**

> "Raymond S. Danis, railroad assessor superintendent of the Department until his retirement on November 15, 1960, has been in railroad valuation work since 1927. As such assessor he assembled all data and prepared his opinion of value. He testified that several factors have been used for more than 30 years in the assessment of railroad property in Illinois, including a judgment factor, but that the primary one is capitalized income. The various factors made up a formula to which the judgment factor was then applied, but he emphasized that the formulaic result did not represent assessment value, and was a guide to be used for comparison purposes. Danis testified unequivocally that in his judgment the assessment of $49,700,000 represented the full, fair cash value of the objector's property in Illinois for 1959.
>
> "James R. Pollack, a city engineer and city manager prior to 1952, was called by the collector. * * * Martin D. Miller, an engineer and appraiser who is a partner in a consulting firm, was also called. * * * (p. 607). Each of these witnesses considered the Illinois system archaic and not adapted to modern conditions, but were not in agreement as to a proper formula to be used. * * * Neither applied a judgment factor and both indicated that the Department's application of that factor constituted debasement and equalization. * * *
>
> "A careful review of the entire record leads to the inevitable conclusion that judgment must be used by appraisers in the intricate problem of arriving at an assessed valuation of a rail-

road, whether it be by using various factors, then applying the judgment factor as is done in Illinois, or the choosing of a percentage for capitalizing net operating income and the fixing of the percentage weight to be given the reproduction cost factor.

"The Department has chosen a method to carry out the statutory mandate and has used it for many years. That method has received the tacit approval of this court in a number of cases. (See *Chicago and North Western Railway Co. v. Department of Revenue*, 6 Ill. 2d 278; *Chicago, Burlington & Quincy Railroad Co. v. Department of Revenue*, 17 Ill. 2d 376; *People ex rel. Hillison v. Chicago, Burlington and Quincy Railroad Co.*, 22 Ill. 2d 88; *People ex rel. Kohorst v. Gulf, Mobile and Ohio Railroad Co.*, 22 Ill. 2d 104.) This attack by the collector upon the method of valuation used by the Department charged with that duty by the State falls short of overcoming the presumption. We are of the opinion that the record bears out the Department's valuation as being the full, fair cash value of the objector's Illinois property" (pp. 608-609).

Korzen. *People ex rel. Korzen v. CB&Q RR. Co.*, 32 Ill. 2d 554, 209 N. E. 2d 649.

The Burlington here objected to 1957 taxes in Cook County, Illinois and pursued the remedy in **Callahan**. The evidence offered by the People in **Korzen** including annual reports to the Illinois Tax Commission and the Department of Revenue, datum sheets, graphs, questionable, suppositious railroad sales-assessment ratio studies and the prior testimony of Danis in **Hillison** was imported to Madison County and admitted in the subject cases. Except for some railroad data originating with the I. C. C. and the testimony of the witnesses Stiles and Hulman, and exhibits relating to their testimony, the People's evidence in **Korzen** and **Musso** (the instant case), is practically identical. **Korzen** was submitted and considered at the same term of the Illinois Supreme Court as **Musso** and the opinion in each case refers to the other. In **Musso** there was offered by the railroads and considered as admissions against interest the much earlier testimony of Danis appearing as railroad assessor and testifying on behalf of the People as admissions against interest at the

trial of six GM&O valuation tax objections for the years 1952-1957 in Madison County. In **Korzen**, an association of school boards was permitted to file briefs as *amici curiae* to urge that the Court re-examine the principles announced in the above cited precedent cases, because of the claimed financial impact of a reversal of the Cook County decision.

> "In addition to the documentary evidence, the objector offered the evidence deposition of Raymond S. Danis, former Supervisor of Railroad Assessment, and Railroad Assessment Supervisor from 1948 to 1960, retired, who was not living at the time this case was heard. He prepared the data sheets upon which was computed a 5-year average of income capitalized at 6%, a 5-year average of market value of stock and debt less nonoperating properties, and the cost of reproduction depreciated of the Illinois property, as furnished by the Interstate Commerce Commission. The system factors of capital and market value were then allocated to Illinois and the Illinois costs of reproduction depreciated were added and the straight average of the three was determined. The straight average was not the assessment and neither was any of the three indicators considered alone. He used the average as a guide and applied his judgment to produce a recommended assessment value to the Director. His recommendations were usually followed. In the event the carrier protested and asked for a hearing, he and the Director would hear the protest and come to a conclusion. He cited as an example the Burlington's 1957 assessment which he fixed at $147,100,000 and following a hearing the Director reduced it to $147,000,000. Danis unequivocally stated that the resultant final assessment was the full fair cash value of 100%, and that there was no attempt to equalize such assessments with locally assessed property.
>
> "At this point we think it appropriate to consider the Collector's attempt to impeach Danis by showing that his testimony in the Lee County *Hillison* case in 1960 was inconsistent with his evidence deposition given in this case in 1962 shortly before his death. His testimony in that case was introduced here. The Collector asserts that it indicated that another factor taken into consideration in arriving at the final assessment was a desire of the Department for continuity of assessments. Not a question was asked of the witness to lay a foundation for impeachment, and his death prevents an explanation. Under such circumstances the impeachment evidence is inadmissible. *Cf. People v. Moses*, 11 Ill. 2d 84; *Ayers v. Watson*, 132 U. S. 394, 33 L. ed. 378, 10 S. Ct. 116.
>
> "This court has given specific approval to the factors used by the Department of Revenue to arrive at railroad valuations in *Hillison, Enrietta* and other cases. And where the Depart-

ment assesses a railroad's operating property in accordance with the recognized and approved factors, it will be presumed to have been assessed at full value as required by statute. *People ex rel. Hillison v. Chicago, Burlington and Quincy Railroad Co.*, 22 Ill. 2d 88; *People ex rel. Kohorst v. Gulf, Mobile and Ohio Railroad Co.*, 22 Ill. 2d 104.

"We are aware of the impact of an adverse holding on the interested taxing bodies but, as readily recognized by *amici curiae*, our decision cannot be based upon their financial needs. *Amici* argues 'the great improbability of accuracy here of presumptions traditionally indulged with respect to the acts of public officials and the contents of public records.' Nevertheless, such a presumption has an important role in our jurisprudence and cannot be ignored. Here, there is no competent evidence to overcome the presumption and, in fact, it is supported by Raymond L. Danis, an expert in this field, who prepared the assessment on behalf of the People through the Department of Revenue" (pp. .....).

APPENDIX B.

Applicable Provisions—Illinois Constitution and 1939 Revenue Act.

Constitution of Illinois 1870.

ARTICLE IX.

Revenue.

"§ 1. The general assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property—*such value to be ascertained by some person or persons, to be elected or appointed in such manner as the general assembly shall direct, and not otherwise;* * * * (Emphasis added), 1965 Ill. Rev. Stat., p. 21.

Revenue Act of 1939 as enacted and in force 1957-1962, incl. Chap. 120, Anno. Stat., or Rev. Stat. of 1961.

RULES FOR VALUING TAXABLE PROPERTY.

§ 501. Valuation of real property

Real property shall be valued as follows:

(1) Each tract or lot of real property shall be valued at its fair cash value, estimated at the price it would bring at a fair, voluntary sale.

(2) Each taxable leasehold estate shall be valued at its fair cash value, estimated at the price it would bring at a fair, voluntary sale.

(3) Each building or structure which is located on the right of way of any canal, railroad or other company leased or granted to another company or person for a term of years, shall be valued at its fair cash value, estimated at the price such building or structure and lease or grant would bring at a fair, voluntary sale.

(4) Any real property on which there is a coal or other mine, or stone or other quarry, shall be valued at its fair cash value, estimated at the price such property, including the mine or quarry, would bring at a fair, voluntary sale.

(5) In the assessment of real estate incumbered by public easement, any depreciation occasioned by such easement shall be deducted in the valuation of such property. (§ 20, as amended in 1945.)

(Subsequent Amendment of 1965 added par. (5) on public easements not relevant.)

§ 502. Valuation of personal property

Personal property shall be valued as follows:

(1) All personal property, except as herein otherwise directed, shall be valued at its fair cash value. * * * (§ 21).

Valuation of Railroad Property.

§ 561. Method of determining fair cash value

The Department shall assess all property owned or used by railroad companies operating within this State, as of April first annually, except property found by the Department to be non-carrier real estate as hereinabove defined.

The Department shall, in determining the fair cash value of the property assessed by it, value all the property of any railroad company as a unit, but shall make due allowance for any non-carrier real estate.

For the purpose of determining the fair cash value of the property of any railroad company the Department shall take into consideration the actual or market value of the shares of stock outstanding, the actual or market value of all bonds outstanding and all other indebtedness as shall be applicable, for operating the road, provided, in determining the market value of any such stock or indebtedness the Department shall consider quotations for the next preceding five years; the net earnings of the company during the five calendar years preceding the assessment date; and such other information as the Department may consider as bearing on the fair cash value of the property: Provided, that the facts hereinbefore named shall not be conclusive upon the Department in determining the fair cash value of the property of a railroad company. The assessment by the Department shall include capital stock and all other property of railroad companies except such property as is found by the Department to be non-carrier real estate as hereinbefore defined; Provided that only so much of the intangible personalty of foreign corporations as has a business situs in Illinois shall be included and so much of the intangible personalty of domestic corporations as has a business situs in other states shall not be included. (§ 80, as amended in 1943 and in force prior to July 1, 1963.)

(As in force prior to equalization amendment of July 1, 1963.)

§ 563. Railroads' annual statement to Department of Revenue

In the month of April of each year every railroad company in this State shall return to the Department, in addition to any other information required by this Act, sworn statements or schedules as follows:

(1) The amount of capital stock authorized and the number of shares into which such capital stock is divided.

(2) The amount of capital stock issued and outstanding.

(3) The market value, or if no market value then the estimated value, of the shares of stock outstanding.

(4) The total amount of all bonds outstanding and all other indebtedness.

(5) The market value, or if no market value then the estimated value, of all bonds outstanding and all other indebtedness.

(6) A statement in detail of the entire gross receipts and net earnings of the company during the five calendar years next preceding the assessment date within this State, and of the entire system from all sources.

(7) The length of the first, second, third and other main tracks and all side tracks and turnouts showing the proportions within this State and elsewhere.

(8) The reproduction cost of the property within Illinois and the total reproduction cost of all property of such company. Said reproduction cost, so far as applicable, shall be as last determined by the United States Interstate Commerce Commission, or other competent authority, plus additions and betterments, less retirements and depreciation to the December 31, next preceding the assessment.

(9) An enumeration and classification of all rolling stock and car equipment owned or leased by the company filing the return. The classification shall show type of equipment and circumstances of ownership and use. The enumeration shall include rolling stock used over the track of other companies under any trackage right agreement. All other property used in connection with a trackage right agreement shall also be listed.

(10) Any other information the Department may require to determine the fair cash value of the property of any railroad company, or necessary to carry out the provisions of this Act.

Such statements or schedules shall be made in conformity to such instructions and forms as may be prescribed by the Department.

In cases where a railroad company shall use property owned by another, the return shall be made by the using company,

and all property operated under one control shall be returned as hereinbefore provided. (§ 82, as amended in 1943.)

§ 565. Interstate allocation of operating property

If any railroad company owns or uses operating property partly within and partly without this State, the commission shall determine the value of the entire operating property of such railroad but shall take only that part of such entire value as is represented by the average percentage of (a) the length of all track including main, second and additional main track, side track and turnouts within this State, (b) its gross revenues arising from railroad operations in this State, (c) the reproduction cost of its operating property within this State, as determined by the Interstate Commerce Commission of the United States, or other competent authority, plus additions and betterments, less retirements and depreciation. Provided nothing in this section shall be construed to preclude the use or substitution of such other factors or methods as may appear reasonable and necessary in determining for any railroad the proportion of its operating property or any part thereof within this State. (§ 84.)

§ 567. Distribution of assessments made by Department

The full fair cash value of the operating property and non-operating personalty of every railroad company subject to assessment shall be listed and taxed in the several taxing districts in the proportion that the length of all the track owned or used in such taxing district bears to the whole length of all the track owned or used in this state, except the value of all station houses, depots, machine shops or other buildings of an original cost exceeding $1,000, which shall be deemed to have a situs in the taxing district in which the same are located. * * * The Department shall equalize and distribute the full, fair cash value of the property of every railroad company (other than non-carrier real estate) to the respective taxing districts entitled thereto and shall certify the same to the county clerks of the respective counties *who shall extend taxes against such values the same as against other property in such taxing districts.* (§ 86, as amended in 1943.)

(Railroads taxed as real estate.)

§ 569. Record book for railroad property

The county clerk shall procure, at the expense of the county, a record book, the form to be prescribed by the Department, in which to enter railroad property as listed for taxation, and shall enter the valuations assessed, corrected and equalized in the manner provided by law; and against such assessed, corrected or equalized valuation, as the case may require, the county clerk shall extend all the taxes thereon for which said property is liable. * * * *The taxes on all railroad property*

shall be extended as on real estate, and shall be subject to the same penalties, dates of payment and methods of enforcement as other real estate taxes. (Excerpts § 88, as amended in 1945.)

As to both State and local assessed corporate stocks, fair cash value was also the standard.

§ 612. Powers of Department of Revenue

The Department shall have power:

* * * * * * *

(10) To adopt, from time to time, rules not inconsistent with law, for ascertaining *the fair cash value of the capital stock,* including the franchise, of corporations assessed by it, for ascertaining the fair cash value of railroad property assessed by it, and for the guidance of local assessment officers relative to the assessment of property for taxation. (Excerpts § 131, as amended in 1943.)

EQUALIZATION OF ASSESSMENTS BY DEPARTMENT OF REVENUE.

§ 627. Authority of Department to equalize

The Department shall act as an equalizing authority. It shall examine the abstracts of property assessed for taxation in the several counties as returned by the county clerks and shall equalize the assessments as in this Act provided. The Department shall[1] lower or raise the total assessed value of property in any county as returned by the county clerk so that such property will be assessed at its full, fair cash value.

By means of a comparison of assessed valuations, as revised by boards of review or boards of appeals, as the case may be, and estimated full, fair cash values established through the analysis of property transfers, property appraisals, and such other means as it deems proper and reasonable, the Department shall annually ascertain and determine the percentage relationship, for each county of the State, between the valuations at which locally-assessed property is listed by assessors and revised by boards of review or boards of appeals, as the case may be, and the estimated full, fair cash value of such property.

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[1] This Section ws amended in 1959 to provide for certifications of equalization factors (multipliers) only in quadrennial assessment years rather than annually, but the section remained unchanged in requiring the Department to ascertain the level of assessment which resulted from the multipliers so certified for every year.

With the ratio so ascertained and determined for each county, the Department shall then ascertain the amount to be added to or deducted from the aggregate reviewed assessment on property subject to local assessment jurisdiction in order to produce a ratio of assessed to full, fair cash value equivalent to one hundred per cent. (§ 146, as amended in 1945.)

§ 632. Certification of equalization rates and Department assessments

When the Department shall have completed its equalization of assessments for any year, it shall certify to the several county clerks the percentage finally determined by it to be added to or deducted from the listed or assessed valuation of property in the several counties, as returned by the respective county clerks. The respective assessments made by the Department on the capital stock, including the franchise, of corporations assessed by it (other than of the capital stock of railroad companies) shall be certified by it to the county clerks of the respective counties in which such companies or associations are located. And said clerk shall extend the taxes for all purposes on the respective amounts so certified, the same as may be levied on the other property in the taxing districts in which such companies or associations are located.

The Department shall also certify to the county clerks of the proper counties the assessments made by it on property owned or used by railroad companies operating within this State, and the distribution of such assessments among the respective taxing districts within the several counties. The county clerks shall extend the taxes for all purposes on the respective amounts so certified, the same as against other property in the taxing districts to which such assessments of railroad property are allocated or distributed.

The assessments on the capital stock, including the franchise, of telegraph companies shall also be certified to the county clerks by the Department. (§ 151, as amended in 1945.)

§ 675. Payment of taxes—Payments under protest

Current taxes on real property shall be payable in 2 equal installments. The collector, when so requested by the party paying the taxes, shall receive and receipt for such taxes in installments. * * *

If any person desires to object pursuant to the provisions of Section 235 of this Act,[1] to all or any part of a real property tax for any year, for any reason other than that the real estate is not subject to taxation, he shall first pay all of said tax installments due, and such payment shall be accompanied by a (written protest) * * *

The person paying real estate taxes under protest shall appear in the next application for judgment and order of sale and object to the taxes in relation to which the protest is made,

and upon his failure so to do, the protest shall be waived, and judgment and order of sale entered for any unpaid balance of such taxes. * * *

In all counties, when the taxpayer appears and files objection, the court shall, after first determining that due notice, if required, has been given to the tax levying unit, hear and determine the matter according to the right of the case and enter judgment for any part of the taxes, or order a refund of any part of the taxes, so paid under protest. Appeals shall lie from such orders of the court as in other cases of objection to judgment and order of sale for taxes. * * * (Excerpts of § 194, as amended in 1957.)

§ 716. Proceedings by court—Form of order—Cure of error or informality

The court shall examine said list, and if defense (specifying, in writing, the particular cause of objection) be offered by any person interested in any of said lands or lots, to the entry of judgment against the same, the court shall hear and determine the matter in a summary manner, without pleadings, and shall pronounce judgment as the right of the case may be: * * * (Excerpt § 235.)

APPENDIX C

CLASS I RAILROADS: NET OPERATING INCOME, CAPITAL EXPENDITURES AND PERCENTAGE OF DOMESTIC INTERCITY FREIGHT TRAFFIC 1950-1961*

	1950	1955	1957	1958	1959	1960	1961
Net Railway Operating Income (Millions).....	$1,040	$1,120	$923	$762	$748	$585	$538
Expenditures for Capital Improvements (Millions):							
Equipment	779	568	1,008	480	568	633	427
Roadway & Structures..	386	340	387	258	250	286	219
% of Total Volume of Intercity Freight Traffic as compared to other means of transportation.....	57.44%	50.43%	47.62%	46.68%	45.68%	44.32%	43.86%
Average mi. of road operated in 000s.....	150	NA	112	NA	NA	88	85

NA means not available from Obj. Exh. 78.

APPENDIX D

COMPARISON OF SALES TO ASSESSMENTS FOR RAILROADS OMITTED FROM PEOPLE'S EX. NO. 1

Railroad	System Mileage	Yr. of Sale	Selling Price Ill. Operating Property	Assessment	Asmts. ÷ Straight Av. of 3 Value Indicators*	Assessment ÷ by Selling Price
Burlington R. R. Co.	7,972	1961	$120,761,956	$140,450,000	76%	116%
Baltimore & Ohio R. R. Co.	5,600	1961-64	25,875,920	26,565,000	82%	102%
Mpls. & St. Louis R. R. Co.	1,506	1960	3,913,977	3,900,000	68%	99%
Illinois Terminal R. R. Co.	344	1954	17,911,450	19,200,000	83%	107%
Illinois Northern R. R. Co.	10	1949	960,000	1,200,000	75%	129%
Indiana Harbor Belt R. R. Co.	N.A.	1961	11,075,950	12,950,000	70%	117%
Average						115%

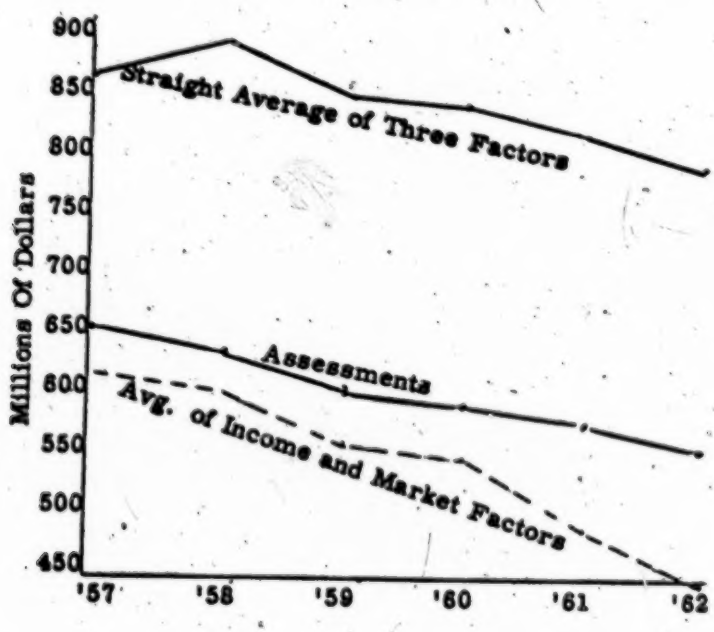
APPENDIX E

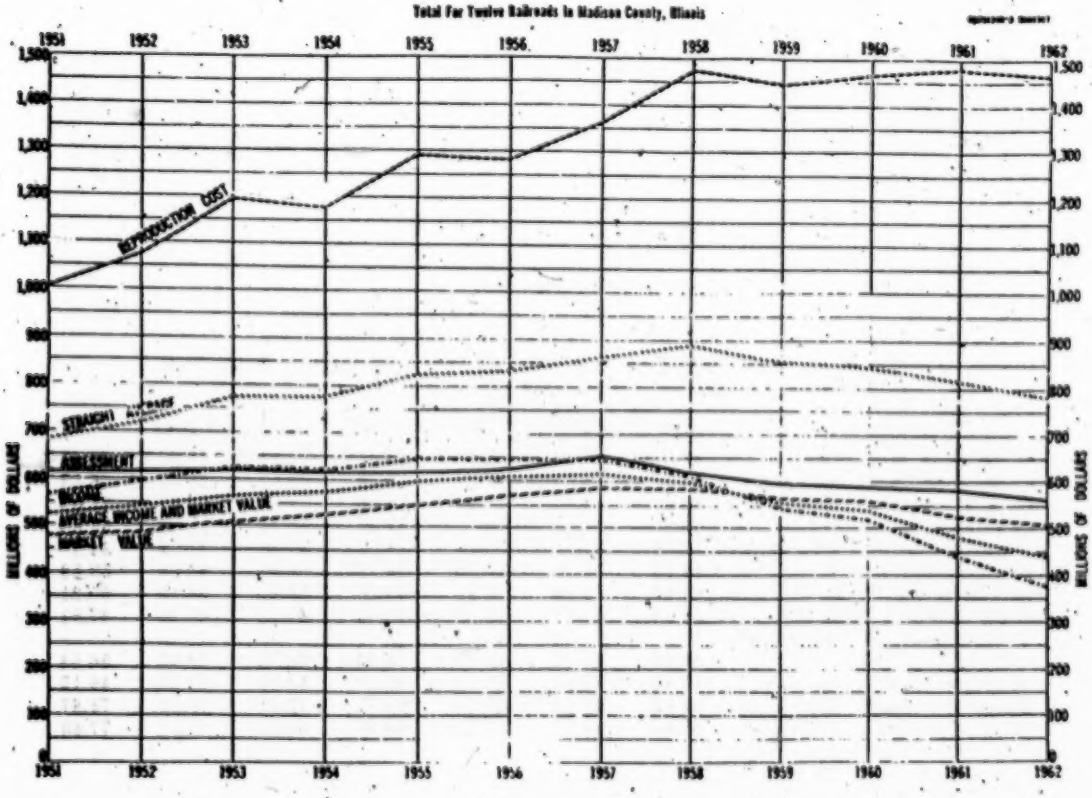
COMPARATIVE WEIGHT OR INFLUENCE OF REPRODUCTION COST FACTOR IN STRAIGHT FORMULAIC AVERAGE*

Railroad	1957	1958	1959	1960	1961	1962	1963
G. M. & O. R. R. Co.	50.6 %	55.38%	56.59%	58.61%	61.64%	63.00%	60.43%
C. B. & Q. R. R. Co.	50.94	54.29	55.44	56.04	56.81	58.39	55.53
C. & N. W. R. R. Co.	70.52	72.31	71.1	71.58	74.8	72.33	72.07
C. & E. I. R. R. Co.	48.11	50.13	51.	51.52	56.42	60.56	56.56
Alton & Southern R. R. Co.	20.66	21.81	23.54	24.65	27.21	27.78	24.8
Ill. Central.....	46.85	49.78	52.28	54.17	58.92	60.99	59.58
Ill. Terminal R. R. Co.	43.67	47.60	55.54	58.28	56.63	54.19	60.21
NYC & St. L. R. R. Co.	38.93	41.38	40.48	41.09	41.52	44.23	47.91
Terminal R. R. Assoc. of St. L.	46.68	49.03	49.54	48.96	50.75	52.20	56.54
Wabash R. R.	46.00	48.38	46.80	49.89	53.50	57.98	49.15
Pennsylvania R. R.	61.63	63.92	66.18	67.71	72.26	75.31	75.87
NYC R. R. Co.	59.45	61.58	63.71	63.62	68.52	72.35	77.85

APPENDIX F

GRAPHS ILLUSTRATING REASONABLE EXERCISE OF RAILROAD ASSESSMENT AUTHORITY BY DEPARTMENT OF REVENUE





APPENDIX G

ASSESSMENTS OF ILLINOIS RAILROADS
1938-1962
(Amounts in Thousands of Dollars)

	Class I Railroads		All Railroads	
	Equalized*	100% Full Value	Equalized*	100% Full Value
1938	$ 252,248	$ 633,120	$ 346,231	$ 948,616
1939	249,174	623,817	347,526	928,058
1940	220,459	629,884	318,477	909,936
1941	220,731	630,659	318,482	909,949
1942	220,740	668,909	315,065	954,742
1943	391,271	724,576	550,094	1,018,693
1944	374,008	733,350	520,147	1,019,897
1945	363,874	791,031	492,196	1,069,992
1946	.....	823,779	.....	1,093,746
1947	.....	819,924	.....	1,077,459
1948	.....	840,145	.....	1,078,971
1949	.....	843,168	.....	1,086,196
1950	.....	830,400	.....	1,075,593
1951	.....	837,510	.....	1,084,964
1952	.....	840,075	.....	1,088,193
1953	.....	848,200	.....	1,096,730
1954	.....	844,840	.....	1,090,815
1955	.....	847,995	.....	1,095,390
1956	.....	849,320	.....	1,098,034
1957	.....	856,150	.....	1,107,399
1958	.....	849,645	.....	1,090,335
1959	.....	824,830	.....	1,055,263
1960	.....	809,200	.....	1,032,528
1961	.....	805,020	.....	1,027,008
1962	.....	785,525	.....	998,361

* No equalization after 1945.

APPENDIX H.

Table Comparing Assessments in a Particular Year With the Immediately Preceding Year's Assessment to Show Lack of Uniform Treatment of Railroads by Assessing Officials and the Absence of a Policy of "HOLDING THE LINE".

(Source: For years 1935 through 1938 sources are Tax Commission Official Reports in evidence; for years 1939 and 1940 the 22 assessments shown are from Krucks' Exhibit of assessment history of 22 Class I Railroads, but the high and low percentage assessments are from the Department Reports; from 1941 through 1951 the 22 railroads are those shown on the Krucks' Exhibit and the reader is referred to the name of the railroad for the high increase and the high decrease percentages; for the years 1952 and 1953 and 1955 through 1961 the number of railroads shown are taken from the Department of Revenue Tables in evidence as noted, which are in consecutive tables; the 1954 assessment compared with 1953 takes all railroads appearing on both tables into account, not just Class I railroads, to determine if a larger sample would have any effect on the remainder of the exhibit, which it did not seem to have. Data for making the 1961-1962 computations is not in the record.)

Years Compared	Source of Info.	RR Included in Table	No. of Ass'ts Increased	No. of Ass'ts Decreased	No. of Ass'ts Not Changed	High % of Incr.	High % of Decr.
1936 to 1935 (Assessments)	A 283	All Roads	28	49	3	62%	27.5%
1937 to 1936 (Assessments)	B 284	All Roads	35	39	5	37%	30%
1938 to 1937 (Full value from now forward)	B 284 (Table xi)	Class I	11	20	0	31% (T.P.&W.)	12% (Chi., Ind. & Louisville)
1939 to 1938	D C 286	22 Class I	11	11	0	34.49%	24.08%
1940 to 1939	D C 287	22 Class I	12	7	3	135.29%	47.54%
1941 to 1940	D	22 Class I	10	7	5	5% (C&NW)	7% (Wab.)
1942 to 1941	D	22 Class I	21	1	0	11% (C&NW)	2% (Nickel Plate)
1943 to 1942	D	22 Class I	21	1	0	13% (C&NW)	1% (I. C.)
1944 to 1943	D	22 Class I	12	5	5	5% (C&NW)	12.5% (So.)
1945 to 1944	D	22 Class I	17	4	1	23% (Mo. (Pac.	7% (Soo)
1946 to 1945	D	22 Class I	19	2	1	6% (I. C.)	18% (T. P. & W)
1947 to 1946	D	22 Class I	3	7	12	5% (Wab)	14% (T.P.&W)
1948 to 1947	D	22 Class I	10	5	7	11% (TP& W)	8% (Penn.)

Years Compared	Source of Info.	RR Included in Table	No. of Ass'ts Increased	No. of Ass'ts Decreased	No. of Ass'ts Not Changed	High % of Incr.	High % of Decr.
1949 to 1948	D	22 Class I	5	2	15	20% (TP& W)	2% (Penn.)
1950 to 1949	D	22 Class I	5	10	7	10% (TP& W)	5% (N. Y. C.)
1951 to 1950	D	22 Class I	14	4	4	18% (C&O)	3% (Penn.)
1952 to 1951	F E	All Class I	19	5	5	12% (C&O)	1% (Ill. Term)
1953 to 1952	G	All Class I	26	10	2	31% (C&O)	3% (Ill. Term)
1954 to 1953	H	All RR's Assessed by State	5	49	17	5% (Ind. Har. Belt)	4% (Mil. Rd.)
1955 to 1954	I	Class I	23	4	11	5% (C&EI)	4% (C&NW)
1956 to 1955	J	Class I	20	3	16	10% (C&O)	6% (Ill. Term)
1957 to 1956	K	Class I	28	4	5	6% (C&EI)	6% (C&NW)
1958 to 1957	L	Class I	1	28	9	0.7% (C& NW)	9% (Union Station)
1959 to 1958	M	Class I	0	34	4	None	9% (Chicago River & Ind.)
1960 to 1959	N	Class I	4	27	8	2% (St. L. Southwestern)	10% (Chicago & W. Ind.)
1961 to 1960	O	Class I	5	31	1	5% (St. L. Southwestern)	3% (Wab.)

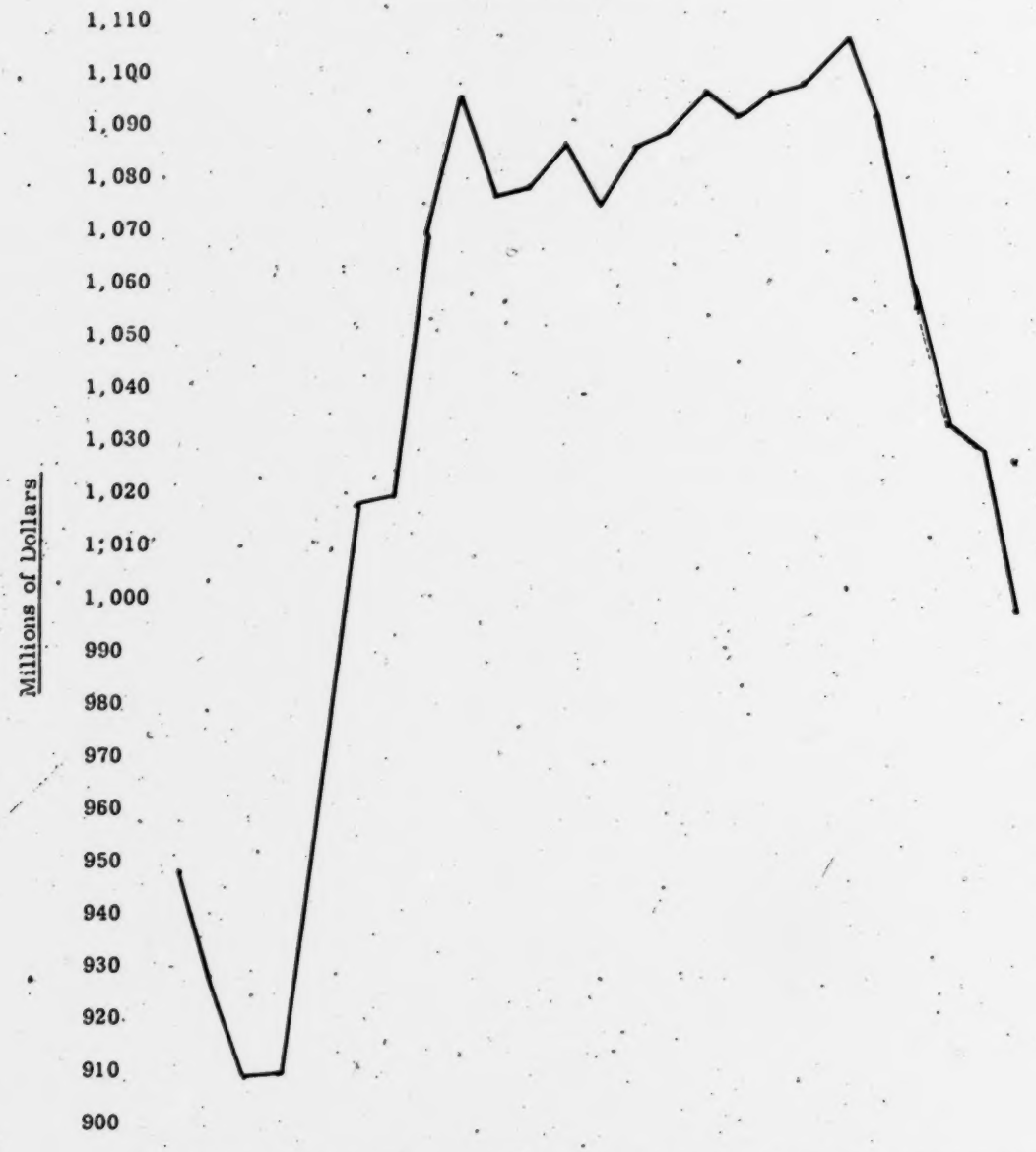
Sources:

A. Coll. Exh. 36, Pages of Abst. Vol II as Noted.
B. Coll. Exh. 37, Pages of Abst. Vol II as Noted.
C. Coll. Exh. 38, Pages of Abst. Vol II as Noted.
D. Obj. Exh. 103, Abst. Vol II, 219-21.
E. Coll. Exh. 5, Abst. Vol II, 273.
F. Coll. Exh. 6, Abst. Vol. II, 274.
G. Obj. Danis Exh. 1A, Abst. Vol II, 240.
H. Coll. Exh. 8, Abst. Vol. II, 275.
I. Obj. Danis Exh. 1B, Abst. Vol II, 241.
J. Coll. Exh. 10, Abst. Vol II, 276.
K. Obj. Exh. 38A, Abst. Vol II, 85.
L. Obj. Exh. 38C, Abst. Vol II, 87.
M. Obj. Exh. 38E, Abst. Vol II, 89.
N. Obj. Exh. 38G, Abst. Vol II, 91.
O. Obj. Exh. 38I, Abst. Vol II, 93.

APPENDIX I

"FAIR CASH VALUE" OF RAILROAD OPERATING PROPERTY IN ILLINOIS 1938 - 1962 *

Total - All Major Class I Railroads

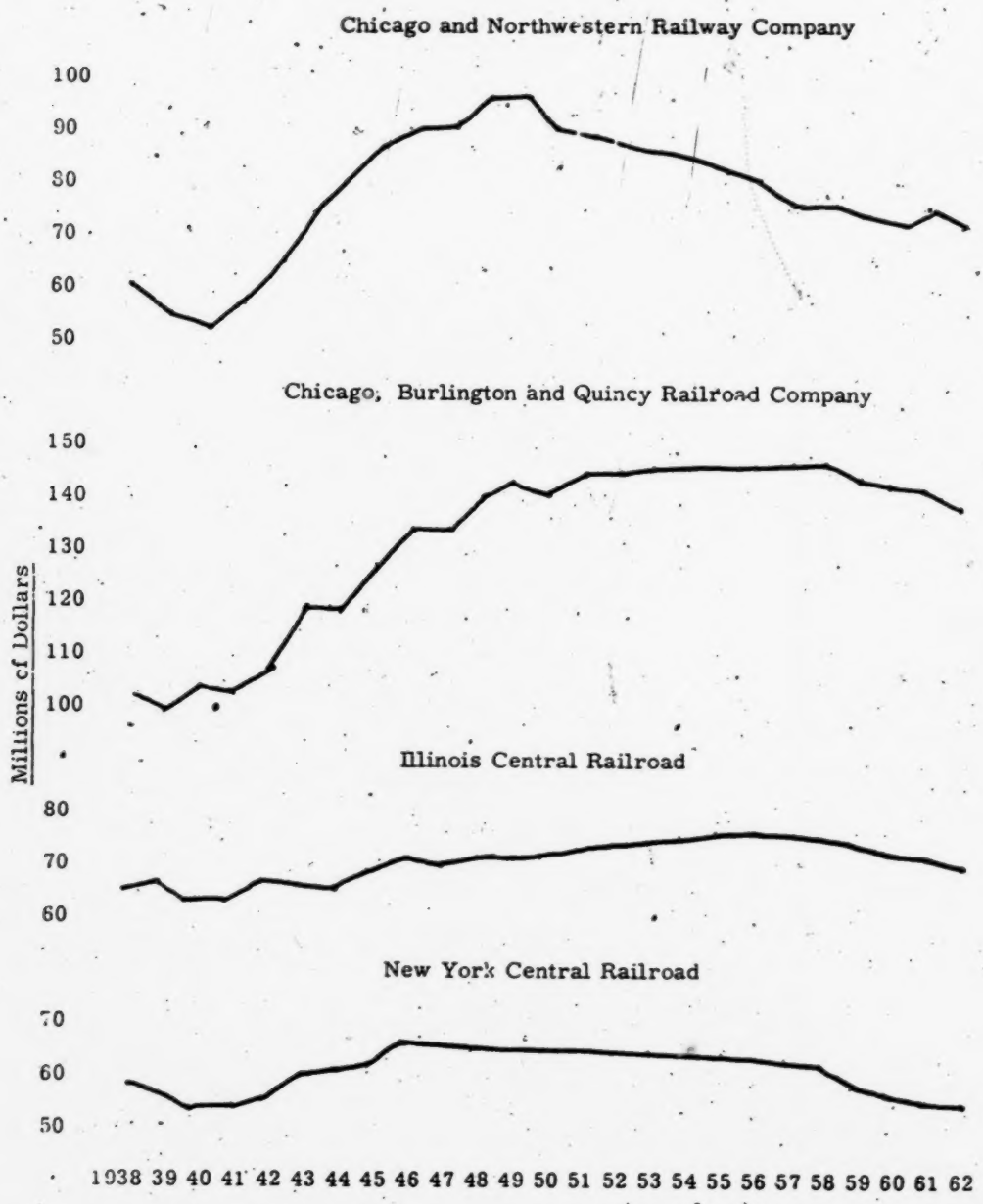


* Source: Objectors' Exhibit 103 and Collector's Exhibit 59A.

APPENDIX J

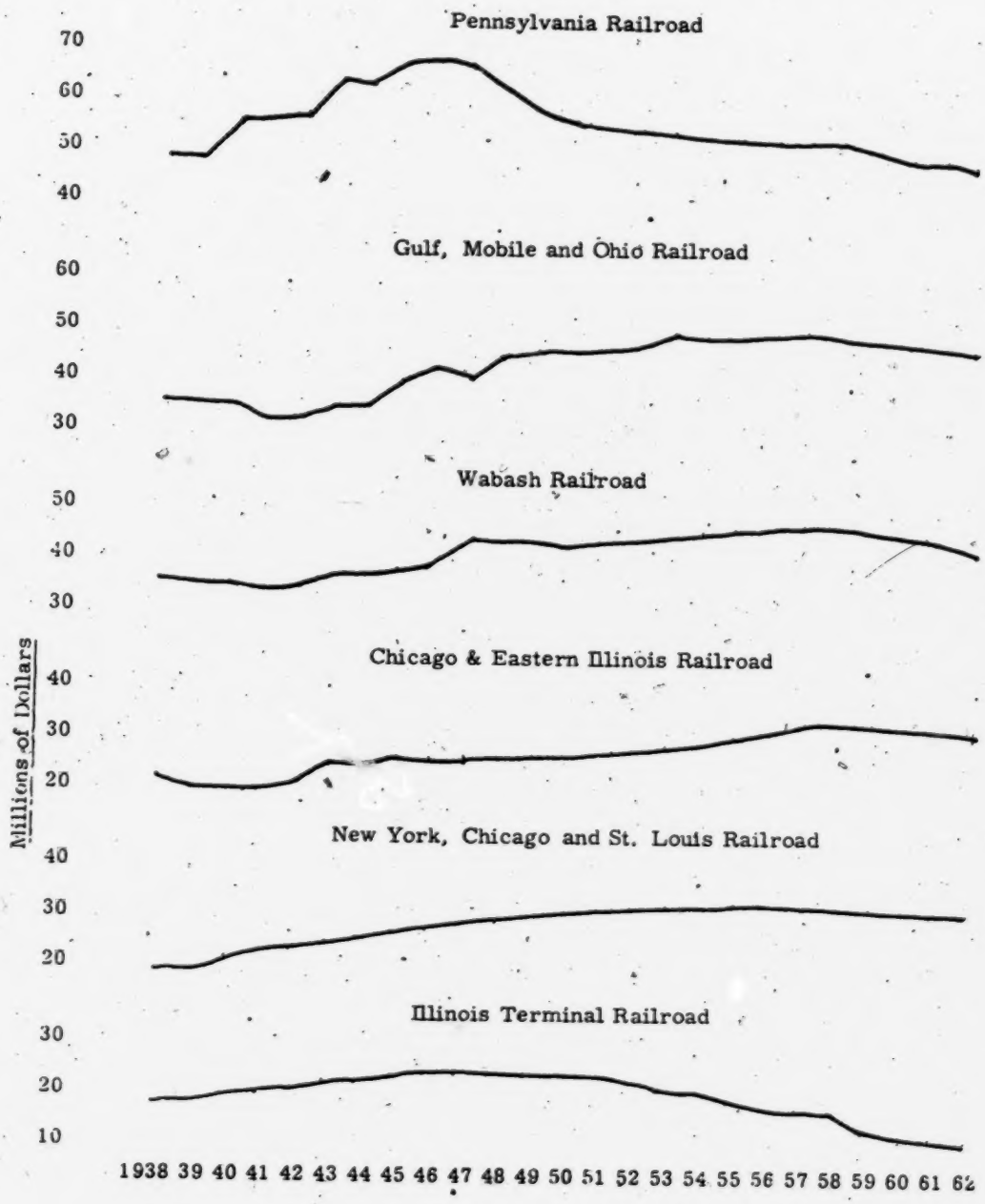
INDIVIDUAL GRAPHS SHOWING FLUCTUATIONS IN RAILROAD ASSESSMENTS, 1938-1962

FAIR CASH VALUE OF OBJECTORS' OPERATING PROPERTY IN ILLINOIS 1938 - 1962 *



*(Source: Objectors' Exhibit 103. Alton and Southern Railroad and Terminal Railroad Association are not included because they are not Major Class I railroads.)

APPENDIX J (Cont'd)



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OCTOBER TERM, 1965.

No. 1046.

PEOPLE OF THE STATE OF ILLINOIS ex rel. GEORGE MUSSO, Madison County Treasurer and Ex-Officio Collector of Taxes of Madison County, Illinois,
Appellant,

vs.

CHICAGO, BURLINGTON AND QUINCY RR. CO., CHICAGO & NORTHWESTERN RR. CO., GULF, MOBILE AND OHIO RR. CO., CHICAGO AND EASTERN ILLINOIS RR. CO., ILLINOIS CENTRAL RR. CO., NEW YORK CENTRAL RR. CO., NEW YORK, CHICAGO & ST. LOUIS RR. CO., WABASH RR. CO., PENNSYLVANIA RR. CO., ILLINOIS TERMINAL RR. CO., ALTON & SOUTHERN RR. CO., and TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Appellees.

On Appeal from the Supreme Court of Illinois.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

and

BRIEF FOR SANGAMON COUNTY, ILLINOIS.

SANGAMON COUNTY, ILLINOIS,
By RAYMOND L. TERRELL,
State's Attorney of Sangamon County, Illinois,
Sangamon County Court House,
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T. W. HOOPS,
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Appellees.

On Appeal from the Supreme Court of Illinois.

MOTION OF SANGAMON COUNTY, ILLINOIS, FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENT AND IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM.

Sangomon County, Illinois respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the Appellant's Jurisdictional Statement and in opposition to Appellees' Motion to Dismiss or Affirm and represents as follows:

1. Sangamon County, Illinois is a duly constituted county and political subdivision of the State of Illinois pursuant to constitutional and legislative enactment. The undersigned State's Attorney and assistant state's attorney are authorized law officers for Sangamon County. Included within the boundaries of Sangamon County is the City of Springfield which since 1837 has been the capitol of Illinois. The population of Sangamon County in 1960 was 146,539. Local government is carried on in Sangamon County with heavy reliance on property tax revenues raised by 133 tax districts including 24 school districts.

2. Sangamon County has a direct interest in this case because there are pending before the Sangamon County Circuit Court at Springfield ten cases involving tax objections filed by the Chicago & Northwestern Railroad Company and the Gulf, Mobile & Ohio Railroad Company for the years 1958 through 1962, inclusive. These cases involve public revenues totaling in excess of $300,000 and the distribution of these monies is largely controlled by the judgments appealed to this Court in this case.

3. Sangamon County believes that the public importance of this case is great and desires to inform this Court of certain facts in support of the public importance.

4. Sangamon County has special knowledge which reflects the effect of the recent constitutional decisions of the Supreme Court of Illinois on the flexibility of the Director of Revenue of Illinois in valuing railroad property and desires to inform this Court thereof.

Wherefore, Sangamon County, Illinois prays that this Court enter its order granting leave to file the attached brief.

Respectfully submitted,

SANGAMON COUNTY, ILLINOIS,

By RAYMOND L. TERRELL,
State's Attorney of Sangamon County, Illinois,
Sangamon County Court House,
Springfield, Illinois 62701,

T. W. HOOPS,
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Appellees.

On Appeal from the Supreme Court of Illinois.

BRIEF FOR SANGAMON COUNTY, ILLINOIS.

SANGAMON COUNTY, ILLINOIS,
By RAYMOND L. TERRELL,
State's Attorney of Sangamon County, Illinois,
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ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

BRIEF FOR SANGAMON COUNTY, ILLINOIS, AS AMICUS CURIAE IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM.

Sangamon County, Illinois, with leave of this Court, respectfully submits this brief in opposition to Appellees' Motion to Dismiss or Affirm:

1. Sangamon County tax districts have levied more than $300,000 in property taxes 1958-1962 which have been collected from the Chicago and Northwestern and the Gulf, Mobile & Ohio Railroad Companies but have been withheld from the tax districts as the result of tax objections filed in court by these two railroads. These objections are pending. Plenary consideration by this court of the issues in this case would affect the distribution of these tax monies.

2. The property tax assessments of railroad property by the Department of Revenue for Sangamon County 1957-1962 were as follows:

1957	$20,454,896
1958	$19,867,809
1959	$18,954,304
1960	$18,297,625
1961	$17,947,482
1962	$16,976,934
1963	$10,960,797
1964	$ 9,530,058
1965	$ 9,639,391

The judgments appealed to this Court imply that the assessments through 1962 were at 100% of value. Such implication serves to maximize refunds to the above-mentioned railroads in pending litigation in Sangamon County.

3. The legislature ordered in 1963 that the Director of Revenue beginning in 1963 equalize railroad assessments according to the statewide level of assessments of local real estate assessments after equalization by the Department of Revenue. The Director has done this in 1963 and 1964. First he determined total value of railroad property and then decreased the valuation by 50% to arrive at statewide assessment. The figures are as follows:

	Total State Valuation of Rr. Property	Total State Assessment of Rr. Property
1963	$1,377,000,000	$688,500,000
1964	$1,192,749,000	$596,637,400

We invite the Court to note how the industry valuation in 1964 decreased about 12% under 1963's valuation, even though there was explicit equalization.

A vivid example of the constitutional command of the Supreme Court of Illinois to the Director of Revenue to deflate railroad property valuation exists in the case of the Chicago & Northwestern.

4. The Director of Revenue in 1963 valued the property of the Chicago & Northwestern without the use of the "judgment factor," and then equalized the figure by 50%. This is proved in the record now in this Court. The railroad sued the Director maintaining the decisions of the Supreme Court of Illinois required the Director of Revenue to use in valuation the "judgment factor" reduction, which in 1962 was $43,000,000. *People ex. rel. Chi. & No. West. Rr. Company v. Hulman,* 201 N. E. 2d 103 (1964). The Supreme Court of Illinois did not decide the case on the merits and remanded the case to the Department of Revenue. In the Spring of 1965 the Director substantially decreased the Northwestern's valuation and equalized assessment for 1963 and at about the same time resigned. The figures are:

Chicago & Northwestern (State of Illinois Figures).

	Valuation	Assessment
1963 Orig.	$114,000,000	$57,000,000
Revised	?	?
1964	$ 85,610,000	$42,805,000
1965	$ 85,610,000	$42,805,000

The 1964 and 1965 figures are taken from official publications: Peoria Star Journal for November 26, 1965 and from the Southern Illinoisan, December 21, 1964, at Carbondale.

Our information is that the Chicago & Northwestern in the last ten years has grown very large and profitable by merger, acquisition and able management, yet its state assessment has been steadily decreasing since 1950.

5. The railroad assessments in Sangamon County for 1963 were $10,960,797, and the figure dropped to $9,530,058 in 1964.

6. In 1958, the assessment of GM&O railroad property certified by the Department of Revenue to Sangamon County was $4,450,496; in 1959, $4,331,845; in 1960, $4,248,285; 1961, $4,211,714; 1962, $3,581,262; 1963, $1,925,402; 1964, $1,449,557; 1965, $1,446,436. For Chicago and Northwestern in Sangamon County: 1958, $1,158,995; in 1959, $1,127,130; 1960, $1,109,870; 1961, $1,076,420; 1962, $1,013,496; 1963, $785,032; 1964, $556,700; 1965, $556,653.

7. The decisions appealed to this Court by the People of Illinois emerge from the uniformity clause of the Illinois Constitution and the Department of Revenue is controlled by them in finding railroad property valuations for the future in spite of the fact that the Department is equalizing the valuations by 50%.

CONCLUSION.

For the reasons stated, Sangamon County respectfully prays that this Court overrule Appellees' Motion to Dismiss or Affirm, and grant plenary consideration.

Respectfully submitted,

SANGAMON COUNTY, ILLINOIS,

By RAYMOND L. TERRELL,
State's Attorney of Sangamon County, Illinois,
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Springfield, Illinois 62701,

T. W. HOOPS,
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WILLIAM M. GIFFIN,
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Appellant,

vs.

CHICAGO, BURLINGTON AND QUINCY RR. CO., CHICAGO & NORTHWESTERN RR. CO., GULF, MOBILE AND OHIO RR. CO., CHICAGO AND EASTERN ILLINOIS RR. CO., ILLINOIS CENTRAL RR. CO., NEW YORK CENTRAL RR. CO., NEW YORK, CHICAGO & ST. LOUIS RR. CO., WABASH RR. CO., PENNSYLVANIA RR. CO., ILLINOIS TERMINAL RR. CO., ALTON & SOUTHERN RR. CO., and TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Appellees.

On Appeal from the Supreme Court of Illinois.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

and

BRIEF FOR THE ILLINOIS ASSOCIATION OF SCHOOL BOARDS AND THE ILLINOIS MUNICIPAL LEAGUE.

THE ILLINOIS ASSOCIATION OF SCHOOL BOARDS and
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Appellees.

On Appeal from the Supreme Court of Illinois.

MOTION OF ILLINOIS ASSOCIATION OF SCHOOL BOARDS AND ILLINOIS MUNICIPAL LEAGUE FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT AND IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM.

Illinois Association of School Boards and Illinois Mnnicipal League respectfully move for leave to file the accompanying brief amici curiae in support of appellant's Jurisdictional Statement and in opposition to appellees' Motion to Dismiss or Affirm and represent as follows:

1. Illinois Association of School Boards is an association organized pursuant to Article 23 of the Illinois School

Code, ILL. REV. STAT., c. 122, §§ 23-1–23-8 (1965). The Association represents more than 1,000 Illinois school districts which educate more than 96% of the public school children of Illinois. More than 50% of the property tax revenues of Illinois have been expended by public school districts.

2. Illinois Municipal League is a not-for-profit corporation organized under the laws of Illinois in 1914. It represents approximately 900 cities, villages and incorporated towns. In 1963, at least 20% of the property tax revenues of Illinois were expended by municipalities.

3. Both movants have obtained the consent of attorneys for the appellant under the rules of this court. The appellees have refused consent to the filing of a brief by the Illinois Municipal League and the Illinois Association of School Boards as *amici curiae.*

4. Both the Illinois Association of School Boards and the Illinois Municipal League were *amici curiae* in *People ex rel. Korzen v. CB&Q,* 32 Ill. 2d 554, 209 N. E. 2d 649 (1965) (Cook County). The appellees failed to disclose this fact to this Court and at the top of page 37 of their Motion describe the State Association of School Boards as "an association of school boards." Furthermore, the appellees omitted mention of the Illinois Municipal League even though they refer to "briefs *amici curiae.*" As a matter of fact movants did not file "briefs" but filed one "'Petition for Leave to Appear as *Amici Curiae*" in *Korzen* which included some suggestions. The identity of your movants as *amici curiae* in the *Korzen* case is not revealed in the opinion of the Supreme Court of Illinois nor is the identity of *amici curiae* mentioned in the Northeastern Reporter. At pages 36-37 of their Motion, the appellees mislead this Court by characterizing the record in the *Korzen* case and the case at bar as "practically identical" and by representing that the movants

here urged the Supreme Court of Illinois in *Korzen* to "re-examine the principles" of the seven quoted cases at pages 27-37 of Appellees' Motion to Dismiss or Affirm. Not only was the record in *Korzen* quite different from the record in the case at bar but also your movants did not ask the Supreme Court of Illinois to re-examine the principles of those cases. Your movants' Petition filed in the *Korzen* case on March 10, 1965, did not mention or cite one case. It made the argument that the evidence in the record rebutted the statutory presumption of full value assessment of railroad property by the Director of Revenue and constitutional issues were not emphasized. The record at the bar of this Court is in important respects fundamentally different from the record in the *Korzen* case. The legal questions emphasized in this case to the Supreme Court of Illinois and to this Court by the appellant here are fundamentally different from those presented and argued in the Cook County appeal to the Supreme Court of Illinois. The record in the *Korzen* case did not include crucial evidence relating to the failure of the successive heads of the Department of Revenue, State of Illinois, after 1946 to equalize local assessments at full value. The record before this Court does contain this important evidence which is directly related to the method by which railroad property was assessed by the said Department in the years 1949 through 1962.

5. Both movants, representing the school districts and municipalities of Illinois, are vitally interested in this case. The granting by this Court of plenary consideration to the questions presented will affect the schools and the cities because the shift of property tax burden to non-railroad property ordered by the Supreme Court of Illinois affects the workability of the property tax system. Also, there are substantial sums of protested and escrowed property tax monies in Madison, Sangamon and Cook Counties, and perhaps elsewhere, which will be distributed

to the railroads instead of the schools and cities, unless relief can be obtained in this Court.

6. Appellees' Motion has described the public importance of this case as "greatly exaggerated." Movants have special knowledge, as well as a special responsibility, and desire to inform this Court that the Appellees' statement incorrectly belittles the public interest.

7. Movants believe that they can make a short but significant contribution by clarifying certain misrepresentations of the railroads and informing the court in limited detail of the increasing voter resistance being encountered as the result of the mounting property tax burden even before allowing for the increase of that burden effectuated by constitutional decisions of the Supreme Court of Illinois 1961-1965.

Wherefore, Movants pray that this Court enter its order granting leave to file the attached brief.

Respectfully submitted,

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Attorneys for The Illinois Association of School Boards and The Illinois Municipal League.

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Illinois Association of School Boards and Illinois Municipal League, with leave of this Court, respectfully submit this brief in support of the appellant.

1. The Illinois Association of School Boards represents most of the school districts of Illinois. In recent years the number of school districts has decreased because of consolidation, from 12,600 to 1,600. As of 1961, there were 1,750,000 pupils enrolled in the public schools of Illinois, and 78,000 persons involved in the instruction of the pupils. For 1958-59, the net operating costs of the public schools were $596,985,991. Including funds for new equipment and for bonds and interest, the cost totaled $686,508,045 or $475 for each pupil. Including amounts for new buildings and grounds, the total cost was $804,469,494, or $559 per attendance pupil. State support was limited to items making up the operating costs of the schools, and amounted to about $107,000,000 or about 18% of the total. This state aid was less than 13% of all costs and less than 16% of costs excluding new buildings and grounds. Practically all the money which supports the public schools in Illinois comes from state and local sources and levies for school purposes generally amount to from 50-70% of all local property taxes. State appropriation for school purposes of "Common School Fund," "Special Education," "Vocational Education," "Transportation" and "School Lunch," increased from $54,929,816 for the 1945-1947 biennium to $361,000,000 for the 1959-1961 biennium. Property taxes for the schools in-

creased from $277,418,000 in 1948 to $628,816,000 in 1958. By 1966 these figures are of course higher. School taxes in Downstate Illinois increased 487% from 1945-1963, from $76,933,474 to $451,803,193. Statewide the increase was 429%, from $167,890,586 to $887,599,502. There are tax rate limits for many school levies in Downstate Illinois and expansion of needs has required and will require voter approval of increases in tax rates.

2. In December, 1965, the Illinois Education Association published "School Bond and Tax Referenda." Cook County was unable to supply data, so that the available data involves Downstate Illinois. The City of Chicago contains 50% of the public school pupils in Illinois and relies on rates set by the legislature rather than those set at local elections. About ⅔'s of state-assessed railroad property is in Downstate counties. There are many school districts downstate which have received 25-33 percent of their tax revenue from railroad property. One school district has received over 49% of its tax revenue from railroad property. An excessive shift of property tax burden to non-railroad property owners is disruptive of the educational system, now and in the future. For the period November 1, 1964-October 31, 1965, six referenda to increase the tax rate for operating the school buildings (or 32%) failed to obtain voter approval and 13 referenda (or 68%) passed. 40 educational fund proposals (36%) were defeated by the voters and 70 (64%) passed. 34 school building fund referenda, or 20%, were defeated and 136, or 80%, passed.

3. Illinois Municipal League, founded in 1914, a member of the National League of Cities, represents the cities, villages and incorporated towns of Illinois. In 1962, there were 287 cities, most of which are in Downstate Illinois. 35% of the population of Illinois lives in the Cities of Chicago and Rockford and the next largest city has a population only 3.6% as large as Chicago. 10.5% of the

total property taxes collected in Downstate Illinois went to cities and 9.7% to townships. In Cook County, 28.5% to cities and .4% to townships. Prices of goods and services purchased by municipal governments have risen faster than the prices of many other goods and services. In 1964 property taxes supplied 44.26% of municipal revenue. In 1962 there were 118 municipalities with populations of 2,500 to 4,999 and the per capita real property tax burden was $79.96. 160 municipalities had populations between 5,000-24,999 with a per capita real property tax burden of $105.17. 41 municipalities had populations of 25,000 and over and the per capita real property tax burden was $113.27. Municipalities operate under legislatively designated tax rate ceilings which can only be increased by referenda. In 1963, twenty cities and villages reported 25 referenda to increase tax rates for various purposes. The voters approved the tax increase only in 10 cases, or 40%. 9 were held for police protection, 8 for fire protection, 3 for general corporate purposes, 1 for water, 1 for garbage collection, and 1 for library purposes. 82 municipalities reported bond referenda. On 89 proposals reported, there was voter approval in almost 80% of the elections. 71 were approved and defeated. 33 of the 71 were for sewer construction, 23 for water, 11 for building. The proportion of property tax revenues from railroad property varies from municipality to municipality.

4. The case of *People ex rel. Korzen v. CB&Q*, 32 Ill. 2d 554 (1965), involved only the Burlington's taxes for 1957. The railroad was the appellant and presented four printed Abstract volumes of the record upon which the Supreme Court of Illinois decided the case. There is nothing in the Abstracts about the level of assessment of locally assessed property or about the valuation method by which the Department of Revenue certified multipliers to Cook County under the Full Value Legislation which went into

effect in 1946. The evidence in the case at bar does explain what happened after 1946 with regard to the equalization of locally assessed property by state administrative personnel. The evidence is important to an understanding of what happened to railroad assessments, and serves to show that the state administrations have been fair to the railroads.

Three briefs were filed in the *Korzen* case for the consideration of the Supreme Court of Illinois: two for the railroad and one for the People. The Briefs are concerned with evidence of a dozen or so railroad transactions. There is no emphasis on constitutional questions.

The case before the Supreme Court of Illinois from Cook County known as *Korzen* involved an appeal from a tax objection case involving the 1957 property assessment for the Burlington challenged for discrimination. *Amici curiae* state that the Supreme Court of Illinois in 1959 had refused to hold that the 1957 assessment for the Burlington was in excess of "fair cash value" in a direct appeal from the Director of Revenue's assessment. *CB&Q Ry. Co. v. Department of Revenue*, 17 Ill. 2d 376 (1957) The *Korzen* case was supposed to be a test case, and the interest of Cook County tax districts and taxpayers now relies on the Madison County case at the bar of this Court.

No attention to the method of valuation of locally assessed property and railroad property was given by counsel to the Supreme Court of Illinois in the *Korzen* case. Brief of Appellant, filed January 5, 1965; Brief of Appellee, filed February 16, 1965; Reply Brief for Appellant, filed March 5, 1965; Petition for *Amici Curiae*, filed March 1965; Objector's Answer to Suggestions in Petition of Illinois Municipal League and Illinois Association of School Boards Appearing as *Amicus Curiae*, filed March 17, 1965.

CONCLUSION.

Illinois Association of School Boards and Illinois Municipal League pray that the Supreme Court of the United States note jurisdiction and grant certiorari.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 1046.

PEOPLE OF THE STATE OF ILLINOIS ex rel. GEORGE MUSSO, Madison County Treasurer and Ex-Officio Collector of Taxes of Madison County, Illinois,
Appellants,
vs.
CHICAGO, BURLINGTON AND QUINCY RR. CO., CHICAGO & NORTHWESTERN RR. CO., GULF, MOBILE AND OHIO RR. CO., CHICAGO AND EASTERN ILLINOIS RR. CO., ILLINOIS CENTRAL RR. CO., NEW YORK CENTRAL RR. CO., NEW YORK, CHICAGO & ST. LOUIS RR. CO., WABASH RR. CO., PENNSYLVANIA RR. CO., ILLINOIS TERMINAL RR. CO., ALTON & SOUTHERN RR. CO., and TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Appellees.

On Appeal from the Supreme Court of Illinois.

APPELLEES' OBJECTIONS TO FILING OF BRIEF AMICI CURIAE.

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Appellees have withheld consent and object to the filing of a brief amici curiae by Illinois Association of School Boards and Illinois Municipal League in support of Appellant's Jurisdictional Statement and in opposition to Appellees' Motion to Dismiss for the following reasons:

a) **MOTION FOR LEAVE TO FILE IS UNTIMELY**: A motion for leave to file a brief amici curiae in support of the jurisdictional statement at this late date is not in accord with Rule 42 (1) of the United States Supreme Court which requires that such a motion be submitted a reasonable time prior to the consideration of the jurisdictional statement. The Notices of Appeal in the instant cases were served on December 23, 1965, and the Jurisdictional Statement on February 21, 1966. On March 23, 1966, Appellees filed a motion to dismiss these appeals and the Court has granted counsel for Appellant an extension of time to April 25, 1966, in which to file a response to the motion to dismiss. Since the Court's rules do not permit Appellees to file a response to a brief amici curiae, it is no doubt contemplated that such a brief must be filed prior to the expiration of the time to file a motion to dismiss, otherwise Appellees will be unjustly deprived of the opportunity to answer the arguments presented in the brief. From the contents of their motion, it is obvious that both of these organizations have long been aware of the existence of this litigation and there is no excuse for delaying the submission of this motion until nearly seven weeks after the filing of the jurisdictional statement and just as the Court is ready to consider the statement and motion.

b) **NO AUTHORITY FOR A BRIEF AMICI CURIAE IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM**: Rule 42 of the United States Supreme Court provides only for the filing of a brief amicus curiae in support of a jurisdictional statement, petition for writ of certiorari, or on the merits. No authority exists for the filing of such a brief in respect to a motion before this Court.

c) **THE MOTION FAILS TO JUSTIFY THE FILING OF A BRIEF AMICI CURIAE**: Rule 42 (3) requires that

the motion "set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case." The motion does not comply with this requirement. Appellant's jurisdictional statement is 46 pages in length plus 70 pages of appendices and Appellant has filed with the Clerk of this Court additional documents to which references are made in the statement. Appellant also intends to file an additional brief in opposition to Appellees' motion to dismiss or affirm and the instant motion states no reasons to believe that Appellant's brief will be an inadequate response. There has been ample opportunity to discuss the facts and pursue all arguments in support of the jurisdictional statement and in opposition to Appellees' motion, and no justification exists for filing any additional briefs amici curiae.

d) **MEMBERS OF THESE ASSOCIATIONS ARE ALREADY REPRESENTED**: These associations represent school boards, cities, villages and incorporated towns located in the State of Illinois. They are public agencies of, and represented by, the People of the State of Illinois, Appellant, which has been held to be the real party in interest in tax objection litigation.[1] The State's Attorney of Madison County, counsel for Appellant, has the legal duty to represent all taxing districts in his county in proceedings concerning the legality and collection of taxes, which includes members of these associations. The Illinois Supreme Court has held that he alone can represent the taxing districts in such litigation and employment of private counsel is unauthorized.[2] Thus the members

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[1] People ex rel. Murray v. The City of St. Louis, 297 Ill. 199, 201, 130 N. E. 366.

[2] People ex rel. School District No. 88 v. Holland, 384 Ill. 277, 51 N. E. 2d 266; Ashton v. County of Cook, 384 Ill. 287, 51 N. E. 2d 161; and Opinions of Attorney General of State of Illinois, 1953, No. 17, p. 66.

of these associations are already represented by counsel for Appellant and should not be permitted to accomplish indirectly what they are prohibited from doing directly.

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Appellees.

On Appeal from the Supreme Court of Illinois.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 1046.

PEOPLE OF THE STATE OF ILLINOIS ex rel. GEORGE MUSSO, Madison County Treasurer and Ex-Officio Collector of Taxes of Madison County, Illinois,
Appellant,

vs.

CHICAGO, BURLINGTON AND QUINCY RR. CO., CHICAGO & NORTHWESTERN RR. CO., GULF, MOBILE AND OHIO RR. CO., CHICAGO AND EASTERN ILLINOIS RR. CO., ILLINOIS CENTRAL RR. CO., NEW YORK CENTRAL RR. CO., NEW YORK, CHICAGO & ST. LOUIS RR. CO., WABASH RR. CO., PENNSYLVANIA RR. CO., ILLINOIS TERMINAL RR. CO., ALTON & SOUTHERN RR. CO., and TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Appellees.

On Appeal from the Supreme Court of Illinois.

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM.*

I. APPELLEES' MOTION SPREADS OBSCURANTISM DESPITE AN ILLUMINATING RECORD.

Appellees (the railroads) state at their page 20 that the public interest in this case is "without documentation" and "greatly exaggerated." Further documentation is set forth in Appendices A and B at i, lv *infra* and

* Emphasis is added throughout this brief unless otherwise stated.

in certain footnotes.[1] Matching this imperviousness is the railroads' refusal to acknowledge the applicability of the Fourteenth Amendment to the supreme court judgments below. Since Appellant seeks plenary consideration by this Court of questions touching discrimination in property taxation, the recalcitrance is noteworthy in view of pronounced railroad protestation during the past six years about property tax discrimination. See, *e.g.*, Map #3, Appendix B, at v *infra*. The questions presented involve whether the Fourteenth Amendment precludes state action which arbitrarily and discriminatively shifts the property tax burden from railroad property to non-railroad property. The comprehensive record in this case affords microcosmic insight into burgeoning and unconscionable use by railroads of the Judiciary in constitutional litigation involving mandates of property tax uniformity and equal protection. Appendices A, B at i, v *infra*. The railroads have been starting litigation and relying on inadequate records which deny the Judiciary the facts and perspective requisite to sound decision. Typical are the records in the twin primordial decisions of *People ex rel. Hillison v. CB&Q*, and *People ex rel. Kohorst v. GM&O*, and *C&NW*, 22 Ill. 2d 88, 104 (1961), which are peculiarly connected with national developments. See note, Map #3, Appendix B at v *infra*. The inadequacy of the records in these two cases is reflected in the court's opinions.[2]

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[1] See, *e.g.*, n. 8 at 7 *infra*; n. 10 at 11 *infra*; n. 12 at 14 *infra*; n. 17 at 17 *infra*; n. 21 at 33 *infra*; n. 22 at 35 *infra*.

[2] *E.g.*, "Plaintiff [the People] offered no evidence to contradict any of these studies [assessment-sales ratio studies] or the other evidence presented by defendant [railroad] showing the assessment level [of locally assessed property]." 22 Ill. 2d 88, 97. ". . . There may have been factors which justify the Department in its action. If there were, it should have been able to articulate them with a sufficient degree of intelligibility to enable a court to deter-

Appellees resist plenary consideration of unusual state supreme court interference with the administration of the property tax system. This interference, commenced in 1961, not only finds discrimination against railroad property, but also determines the amount of the discrimination. The interference has disrupted the work of successive tax chiefs appointed by successive constitutional officers, the Governors of Illinois.[3] Occurring in Illinois,

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mine whether such action by the Department had a reasonable basis or was completely arbitrary. This the plaintiff has made no attempt to do." *Id.* at 101. At 99, the court referred to "the absence of evidence to the contrary," and at 109, anent railroad property assessment, "There is no evidence in the record to overcome. . . ." Faced with barren records regarding background actions of the Directors of Revenue and related data the court resorted to utilization of presumptions of statutory compliance by the Directors, overlooking that in 1949, in connection with certain aspects of the Fair Value Legislation effective January 1, 1946, the court had reiterated the presumption that tax officials have discharged their "duties." People ex rel. Ingram v. Wasson Coal Co., 403 Ill. 30, 37 (1949). See n. 6 at 14 of the Jurisdictional Statement. The duties of Illinois' tax chiefs, the Directors of Revenue, include the enforcement of the uniformity clause of the Illinois Constitution and the Fourteenth Amendment. Broader use of the true presumption in *Hillison* and *Kohorst* would have placed the burden of proof on the railroads as regards the value of their property. Restricting "duties" to statutory ones, the supreme court below in those two cases placed the burden of proof of railroad property valuation on the People, who had not offered adequate evidence. See pp. 44-47 *infra*.

[3] In 1943 the Illinois Legislature concentrated responsibility for the administration of the property tax in one official, the Director of Revenue. The legislature has, since 1943, commanded the Director in the following language: "Each department shall have an officer at its head who shall be known as a director, and who shall, subject to the provisions of this Act, execute the powers and discharge the duties vested by law in his respective department. The following officers are hereby created: . . . Director of Revenue, for the Department of Revenue. . . ." ILL. REV. STAT. ch. 127, § 4 (1965, 1963, 1961, 1959, 1957, 1955, 1953, 1951, 1949, 1947, 1945, 1943). The Director's term of office is "two years from the third Monday in January of each odd-numbered year and until his successor is appointed and qualified." *Id.* § 13. The Director is required to "report in writing" at least annually to the Governor, who appoints the Director by and with the advice of the Senate. *Id.* § 25.12. The Illinois Constitution provides: "The supreme ex-

which contains the largest number of railroads, the highest state assessment of railroad property and the most units of local government,[3a] this interference has created a precedent of widespread influence, which is all the more significant because after 1933 Illinois state tax administrators were acknowledged as leaders in the improvement of state tax administration. The judgments of the Supreme Court of Illinois now appealed to this Court culminate a line of eight decisions during the decade 1955-1965. The effect of *Hillison* and *Kohorst supra* decided in 1961 was to order the People's agents, the county tax collectors, to return to the railroads for the period 1957-1962 approximately ninety millions of the public revenue and to require the Governor's tax chiefs in the future to discriminate against the People of Illinois in favor of the railroads via valuation methodology.[4]

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ecutive power shall be vested in the governor, who shall take care that the laws be faithfully executed." ILL. CONST. ART. V, § 6 (1870). His removal powers are specified in ILL. CONST. ART. V, § 12 (1870). The official oath is: "I do solemnly swear (or affirm, as the case may be,) that I will support the constitution of the United States, and the constitution of the State of Illinois, and that I will faithfully discharge the duties of the office of ——— according to the best of my ability." *Ibid.*, ART. VI, § 25.

[3a] VII CENSUS OF GOVERNMENTS 1962, No. 13, GOVERNMENT IN ILLINOIS. Illinois ranked first in number of local governments: 6,542 units, including 102 county governments of which 5,388 had property-taxing power, comprised of 1,251 municipalities, 1,433 townships, 1,540 school districts and 2,126 special districts. In 1962 Madison County had 113 units of local government of which 101 had property-taxing power, comprised of 24 municipalities, 24 townships, 15 school districts, and 49 special districts. Cook County had 460 units of local government of which 442 had property-taxing power, comprised of 119 municipalities, 30 townships, 151 school districts and 159 special districts. In 1962, Illinois' per capita property tax bill was $130.28, 127% of the national per capita property tax bill. *Id.* at 36, 8.

[4] Three decisions of the Supreme Court of Illinois in 1955, 1956 and 1959 denied property tax relief to three railroads. C&NW v. Dept. of Revenue, 6 Ill. 2d 278 (1955), cert. denied, 351 U. S. 950 (1956), rehearing denied, 352 U. S. 859 (1956) (al-

The effect of the Appellees' Motion is to obscure the nature and the extent of this interference by the Supreme Court of Illinois with the state administrative process. The Motion obscures the truth that the evidence which frames the questions presented is small in quantity and indisputable in meaning. See pp. 32-33 *infra*. The element which dominates the record before this Court is the inflating price level since 1946.[5] The response to inflation by Illinois' state tax administrators was uniform. They disregarded the effect of the inflating price level both in equalizing locally assessed property and in assessing railroad property.[6] As time passed, the property tax burden

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leged overassessment); People ex rel. Callahan v. GM&O, 8 Ill. 2d 66 (1956) (alleged discrimination); CB&Q v. Dept. of Rev., 17 Ill. 2d 376 (1959) (alleged overassessment). In October, 1960 all three railroads, pursuing claims of unconstitutional discrimination, filed appeal records in the supreme court below. The C&NW and GM&O appeals from Sangamon County for tax year 1957 were consolidated, and the Supreme Court of Illinois handed down twin decisions in Hillison and Kohorst on March 29, 1961, which not only granted the relief prayed in full but also sub silentio eliminated the influence of cost of and investment in property in the valuation of railroad property, in effect overruling the earlier 1955 and 1959 decisions on this point, 22 Ill. 2d 88, 104. See pp. 63-69 *infra*. See note, Map #3, Appendix B.

[5] "By inflation we mean a time of generally rising prices for commodities and factors of production." SAMUELSON, ECONOMICS —AN INTRODUCTORY ANALYSIS 268 (6th ed. 1964). Substantial historical evidence available in 1946 supported the view that the price level would not inflate or continue to inflate following World War II. See, *e.g.*, Southwestern Bell Tel. Co. v. Missouri Pub. Serv. Com., 262 U. S. 276, 289, 303 n. 15 (1923) (Brandeis, J., concurring). The removal of federal price controls, the pent up demand for goods, and short supply contributed to the steep and sharp inflation which commenced in 1946, intensified in 1950 by the outbreak of the Korean hostilities. See Appendix B at infra.

[6] The trial judge, Hon. James O. Monroe, Jr., on August 20, 1964, entered judgments ordering tax refunds for the railroads after hearing evidence from time to time during a period extending from April to July 1964. The trial court's findings reflect the conclusion that whereas the Directors of Revenue had failed to

increased for all taxpayers because of expansion of local governmental activity, forcing the tax rates to increase. At the instance of three railroads, the Supreme Court of Illinois in 1961 enforced the uniformity clause of the Illinois Constitution, which limits the conduct of the Legislature, the Governor and his administrative tax chief. See pp. 19-33 *infra*. Implementing constitutional mandate, the Supreme Court of Illinois tied the value of locally assessed property to the inflation balloon but failed to connect the value of railroad property to the same balloon.[7]

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eliminate completely discrimination between locally assessed property and state assessed railroad property, they had been successful in containing and reducing it 1949-1962, until the legislature in 1963 acted to provide explicit statutory authority for state equalization of railroad property assessments with state equalized local assessments.

[7] Price is a key determinant of property value. See, *e.g.*, TAUSSIG, PRINCIPLES OF ECONOMICS 111-13 (1922). Railroad witness Rolf Weil, an economist, academician and rigorous theorist, expressed his opinion on the value of locally assessed property in Madison County (and in other counties in Illinois and elsewhere on behalf of railroads) proceeding from the premise that current price (spot price) in the market place as captured in assessment-sales ratio studies produces value. See n. 27 at 51 *infra*. So rigorous is Weil's application of theory that he condemns averaging such annual sales ratios for a period of years ("period" prices) in order to determine value of locally assessed property. Less rigorous, the staff of the Interstate Commerce Commission based its reproduction-cost new figures on "period" rather than "spot" prices. See, *e.g.*, INTERSTATE COMMERCE COMMISSION, BUREAU OF VALUATION, STATEMENT OF METHODS EMPLOYED IN THE ASCERTAINMENT OF THE ELEMENTS OF VALUE as of January 1, 1948, 1950, 1951, 1952, 1953, 1954, 1955, 1957, 1958, 1959, 1961, 1962. Peo. Ex. 72. IV Exhibits. Appellant sponsored testimony of an economist and property tax expert on the valuation of railroad property, whose opinion is that reproduction cost and therefore price inflation should also be given significant, if not predominating, weight in valuing railroad property. Speaking through one of Janus's mouths, the railroads condemned the appellant's economist as "theoretical economist" and "economic theorist," Rr. Briefs at II Ill. Sup. Ct. Rec. 84 (p. 32); I Ill. Sup. Ct. Rec. 22 (p. 19), having first sponsored an economist to opine on the value of other people's property based exclusively on "spot" prices.

This was done despite the fact, now proved for the first time in this case, that the Directors of Revenue, after 1948, had achieved an equipoise between the two categories of property, each resting on opposite ends of a figurative seesaw. Imbalance resulted when the Supreme Court of Illinois relieved the railroads of the effect of inflation and refused to do the same for all other property owners. The seesaw is now tilted significantly. Constitutional decision requiring that the property tax bill for local government in Illinois must be distributed between state assessed railroad property and locally assessed property by deflating the value of railroad property and by inflating the value of locally assessed property serves to insulate railroad property from *ad valorem* taxation to an extent exceeded in its effect only by outright exemption.[8]

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[8] The shift of the property tax burden from railroad property to non-railroad property ordered by the Supreme Court of Illinois is more onerous for Downstate and Madison County taxpayers than for Cook County taxpayers. Of the 102 Illinois counties, the three which in 1962 contained the largest total assessed valuations were Cook, DuPage and Lake, all contiguous and in the Chicago metropolitan area. Madison County ranked fourth. In 1962 state assessed railroad property composed 4% of the total tax base in Madison County; it composed only 1.7% of the total tax base in Cook County, which contained 46% of the total property tax base of Illinois. In 1962 state assessments of railroad property composed 3.7% of the tax base in Downstate Illinois. Peo. Ex. 20F, 19A. I Exhibits.

Chicago is not only a major transportation hub of the nation but apparently includes a large portion of the railroad property in the state; twenty trunk lines originate there. As America's railroad empire developed, Chicago was at the end of the line for the eastern railroads and the beginning of the western railroads. Halvorsen, "Chicago Is Busy Hub of Vast Transportation Network," Chicago Tribune, Mar. 7, 1966. **Nevertheless, in 1962 only 28% of the total state assessment of railroad property was in the Cook County tax base and 72% in Downstate Illinois!** Approximately 3.3% of the total state assessment of railroad property and 4.6% of the Downstate Illinois portion was in Madison County. Peo. Ex. 20F, 19A. I Exhibits.

Even in Cook County the voters have rebelled against the growing property tax load. There the tax rate jumped from

The tilt in the seesaw will worsen as inflation intensifies. If inflation continues and the investment in and cost of railroad property increase, as does the value of other people's property, the proportionate share of the tax burden borne by the railroads will automatically decrease. *Mirabile dictu!* See n. 29 at 40, Jurisdictional Statement. Legislatively prescribed equalization of railroad property valuations, if based upon deflated figures, does not eliminate this intensifying discrimination.

The Record in this case is the first and only one of six filed in the Supreme Court of Illinois 1960-1965 which contains data over a significant period of time for all state assessments of railroad property, revealing assessment methodology **and** explanatory evidence concerning the debacle of the Illinois Full Value Equalization legislation which went into effect on January 1, 1946.[9] Perhaps the

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$2.75 per $100 of assessed valuation in 1946 to $5.32 in 1962. In 1962 the voters rejected by substantial majorities six bond issues totaling $66 million submitted by the city administration for sewers, street lighting, incinerators and other public works, all "needed improvements." The Chicago Tribune editoralized: "Other large cities are in the same boat, because property owners everywhere resent high taxes. Mayors of all the cities have been clamoring for more help from the federal government to relieve the pressure on local taxpayers . . . the voters should not overlook the fact that shifting the tax collecting process to the federal government does not relieve them of paying the taxes. All taxes—federal, state and local—are paid in the end by the same people." Chicago Tribune editorial, Feb. 23, 1966. As a result of the 1962 vote, the public works program has come almost to a halt. On April 20, 1966, the Mayor proposed six new bond issues for $195,000,000, assuring the voters that approval of the issues would not increase property taxes. Chicago Tribune, April 21, 1966, p. 1, col. 5; Sullivan, "The Bond Issue: Daley Spells Out Benefits to City," Chicago Sun-Times, April 21, 1966, p. 1, col. 1. See Lens, "Daley of Chicago," 30 The Progressive, No. 3, 15 (Mar. 1966).

[9] "In any evaluation of this conflict [between law and assessment practice] it is important to note that the extent of administrative deviation from the market value standard hinges primarily on the dynamic fluctuations of the price level because of

record is also the first from the lower courts to arrive here and meaningfully suggest a cardinal consequence of post-World War II inflation on *ad valorem* tax assessments by

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the essentially static nature of real property assessments . . . . It was this same interaction of steadily rising property values and relatively static assessments since World War II that has now plunged real estate assessment ratios to their lowest level . . . . Although the various rationalizations employed to justify administrative deviation from the state full value assessment laws lack substantive validity, they do point up the presence of political obstacles to the attainment of full value assessment. State officials charged with responsibility for raising depressed local assessment levels to the full value standard fear that the state administration in general and the governor in particular will be blamed for the increase in the local property tax load . . . . Because state tax authorities are usually directly responsible to the governor they will not disturb the local status quo without first obtaining the governor's approval. Most governors have been extremely reluctant to pull local fiscal chestnuts out of the fire by ordering 'blanket' increases in local assessment levels . . . it is not difficult to understand why assessment officials or those who control local assessment policy tend to freeze assessed valuations during periods of rising property values rather than run the risk of becoming political scapegoats by constantly increasing assessed valuations. 'If it is suggested that the officials are lacking in courage, there is the obvious rejoinder that it takes extraordinary courage to do something that is predestined to have an undesirable development for which you are not responsible, but for which you know you will be blamed. California State Board of Equalization, Annual Report, '50-'51, p. 5' . . . . The tradition of local assessment autonomy stands out as the second major barrier to administrative compliance with state assessment law . . . state property tax experience indicates that in the absence of effective political support, it is futile to give state tax authorities coercive authority over local assessment officials. Most state tax authorities are keenly aware of the distinction between legal authority and political power. Because their tax chiefs ordinarily lack sufficient political support from the governor and state legislatures, state tax officials are required to handle local assessors with 'kid gloves' . . . ." "Conflict Between State Assessment Law and Local Assessment Practice," a paper delivered in June 1965 in Milwaukee by Dr. John Shannon, Senior Analyst, Advisory Commission on Intergovernmental Relations, at a Conference on Property Taxation U. S. A. sponsored by the Committee on Taxation, Resources and Economic Development. See also Shannon, THE CONFLICT BETWEEN LAW AND ADMINISTRATIVE PRACTICE IN THE VALUATION OF PROPERTY FOR TAXATION IN KENTUCKY, BULLETIN NO. 31 OF THE BU-

state officials of railroad property: widespread obscurant and arbitrary administrative integration of the distinct functions of valuation and equalization into the single act

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REAU OF BUSINESS RESEARCH, COLLEGE OF COMMERCE, UNIVERSITY OF KENTUCKY (1957).

The decision by Illinois' Directors of Revenue to ignore price level increases in equalizing locally assessed property and in assessing railroad property, deferring to local assessment policy of elective local assessors in the counties of Illinois, was, according to the record and all other available information, made during the period 1949-1950. In concrete terms, this policy decision was implemented by holding the line on multipliers certified to the counties for equalization purposes, allowing for adjustments to offset any change in local assessment policy, and holding the line on state assessments. As time passed and inflation continued, this policy decision, inherited by successive administrations, increasingly brought Directors of Revenue in conflict with statutory duties of full value equalization of locally assessed property and full value assessment of railroad property.

On November 30, 1961, the 72nd General Assembly enacted H. Bill No. 17 creating a Commission on Revenue, and on June 15, 1963, the Commission transmitted its final report to the Governor. The research staff was headed by Dr. H. K. Allen, who had acted in the same capacity for the 1949 Revenue Laws Commission. Dr. Allen wrote chapter XIV on "State Equalization of Local Assessments" at 506-520. At 516-519 he wrote: "Until recently, the Department of Revenue never officially disclosed the standard used in computing county multipliers. [From the assessment-sales ratio studies for Lee County, 1946-1957] it is evident that the standard for computing county multipliers has not been full, fair, cash value at any time since the program became effective in 1946 . . . . In the opinion of the writer the debasement of the standard used in equalizing locally-assessed property has resulted primarily from strong outside pressures . . . . Blame for the situation lies largely with the prevailing form of administrative organization for state equalization and assessments which, because of its political orientation, is especially vulnerable to outside pressures. No criticism of the personnel of the Department of Revenue is intended. The Department has on its staff many highly competent and dedicated individuals. *The incumbent Director of Revenue has 'inherited' the present situation from his predecessors.*" See REPORT TO GOVERNOR DWIGHT H. GREEN FROM THE JOINT LEGISLATIVE COMMITTEE TO INVESTIGATE TAX PROBLEMS, Mar. 2, 1945 (precursor of Full Value Legislation approved in June, 1945) (Executive Secretary, Lynn A. Stiles, key aid to Director of Revenue, whose testimony is at R. 2272-2336, 2459-2466. IV Test.); REPORT OF THE REVENUE LAWS COMMISSION OF THE STATE OF ILLINOIS 54 (1949); remarks of Ernest C. Marohn, Assistant Director of Rev-

of assessment.[10] Judicial denomination of such deflated assessments as value determinations discriminates against locally assessed property figured at full value.

II. APPELLEES' MOTION FENDS PLENARY CONSIDERATION BY EXPLOITING THE CONFLICT BETWEEN LAW AND ADMINISTRATIVE PRACTICE.

The inadequate record which characterizes the Illinois uniformity litigation 1960-1965 is not uncommon. Nor are the causes peculiar to Illinois. One explanation is the manner in which the uniformity issue arises and its inherent difference from the overassessment issue. In overassessment litigation the railroad enters the courts on statutory levels involving the question of whether its property has been assessed in excess of the legal standard for a particular year. Not only does the record fail to contain evidence of the assessments of that railroad's property over a significant period of time, but also

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enue, October 1950 in ASSESSMENT ADMINISTRATION: 1950, pp. 64-66 (pub. by National Association of Assessment Officers) (in Library of Congress); ILLINOIS PROPERTY TAX STATISTICS for 1943, 1944, 1945, 1946, 1947, 1948 (by Property Tax Division of the Illinois Department of Revenue) (no publication after 1948).

[10] "It should be emphasized at this point, I believe, that there is a fundamental difference between assessment and equalization . . . . It seems that the essential element in equalization is the determination of the common denominator or yardstick. Without such a yardstick it is impossible to measure variation in assessment levels in different areas and for different classes of property. Since assessments are supposed to be according to value, value must be our yardstick and our concept of value must be clear and certain." MAYNARD, THE ILLINOIS PROGRAM OF EQUALIZATION, PROCEEDINGS OF THE NATIONAL TAX ASSOCIATION 268-269 (September 1949). See n. 22 at 35 *infra*; pp. 75-76 *infra*.

Note 20 at 33-34 of the Jurisdictional Statement incorrectly states the text of Question 20 in the NATA Committee Questionnaire, answers to which are corroborative of state administrative assessments of railroad property at less than the legal standard. Question 20's correct text is: "Where the statute requires that public utilities be assessed on a full value basis would you say there

it does not contain evidence of the assessments over time of other railroad property within the jurisdiction. Even if the record were adequate in these two areas, there is no revealing evidence about the conduct, over a significant period of time, of state administrative officer(s) vis à vis equalization of locally assessed property. In such litigation the assessment of railroad property is upheld if it does not exceed the legal standard. Whether or not the railroad property assessment is less than the legal standard is not germane to the issue before the court in such cases.

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is some tendency, administratively, to debase the full value assessment to a certain extent to allow for the lower assessment level prevailing locally?" In 1953 the Tax Commission of Washington initiated a program in which the level of assessment of state assessed railroad and utility property would be reduced about 10% a year until it was in line with the level of assessment of locally assessed property. The program will be completed in 1967. Letter from George Kinnear, Chairman, Tax Commission of the State of Washington by Clyde B. Rose, Property Tax Director, to Burton C. Bernard, April 4, 1966.

In 1961 the total property tax assessments in the United States subject to "local general property taxation" were $367,323,000,000. The total figure subject to "local general property taxation" after exemptions was $355,716,000,000. Of this latter figure, 1.7%, or $5,939,000,000, consisted of state assessed railroad property subject to "local general property taxation", and 5.3%, or $18,754,000,000, consisted of state assessed "public utility" property subject to "local general property taxation". State assessed railroad property subject to "local general property taxation" ranged on statewide bases, from 8.3% of total assessments in West Virginia to .7% in Maryland. II CENSUS OF GOVERNMENTS: 1962, "TAXABLE PROPERTY VALUES" 28-29. (Peo. Ex. 58. I Ex.) See Appendix E, Jurisdictional Statement A-51. Counsel for Appellant have to date seen data on state assessments of railroad property for only a limited number of states, but have confirmed that since the late 1940's state assessments of railroad property have not increased significantly, if at all, and indeed have generally decreased since the mid-1950's in the following states: Idaho, Illinois, Iowa, Missouri, Montana, South Dakota, Utah, Washington, Wisconsin and Wyoming. In Alabama, California, Utah, Michigan, state assessments have been declining since 1957. See n. 22 at 35 and Appendix B at v *infra*.

In contrast, the uniformity issue does involve state administrative action toward both categories of property; and, in the uniformity case, relief for the taxpayer is maximized by proving that the railroad property assessment is at the legal standard (or higher) and that the equalized assessment of locally assessed property is far below the legal standard. In any event, the typical record in uniformity cases involves one or two railroads for one or two years, and the evidence over time with regard to both categories of property is lacking. Proof limited to such narrow ambits in the complex field of post-World War II property tax administration cannot provide the insight and perspective requisite to sound decision.

A second cause of the inadequate record in the uniformity case, however and wherever it arises, is the penumbral silence of state tax administrators. Appellant submits that the silence is produced by the political consequences thought to ensue from a candid exposure of conflict between the law and state administrative practice. This conflict has deepened since 1946 because of inflation, local asessment practice and mounting local government needs. Comprehension requires precise definition of contemporary functions of state administrations in raising revenue for local government. Popularly elected, Governors generally appoint the administrative tax chiefs, whether a single person or a multi-member commission.[11] The Governors' appointees have since World War II confronted two legal duties imposed by legislative enactment: (1) to increase the total local assessment in each county to the legal standard of assessment (inter-county equali-

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[11] As of the early 1950's there were ten states in which state assessment and equalization functions were concentrated in one official: Alabama, Florida, Georgia, Illinois, Massachusetts, Minnesota, New Jersey, Ohio, South Dakota, Vermont and Wisconsin. Rr. Ex. 64, p. 68. XI Exhibits.

zation); (2) to assess a minute portion of the tax base, *e. g.*, railroad property, according to the same legal standard of assessment. (See Maps #1 and #2, Appendix B at v *infra.*) These standards are based on the economic concept of value. The state tax chiefs also confront overriding legal duties imposed by state and federal constitutions.[12] During the late 1940's and early 1950's it was not clear whether the law required property tax valuations and assessments to be based on current prices if extraordinary inflation or deflation existed.[13]

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[12] Comprehensive analysis of state constitutional uniformity provisions is in NEWHOUSE, CONSTITUTIONAL UNIFORMITY AND EQUALITY IN TAXATION (1959). "The subject of discrimination and denial of equal protection of the laws under the United States Constitution occupies a prominent place in our daily newspapers. However, the subject of equal protection of the laws is not limited to the field of civil rights, but is also the primary organic principle governing the ad valorem property tax." Robert F. Kilmer, Esq., Counsel, New York State Board of Equalization and Assessment. PROCEEDINGS, NATIONAL TAX ASSOCIATION 413 (1958).

[13] The "normal value" theory is that valuation of property for assessment purposes need not reflect "boom or bust" prices. See I BONBRIGHT, THE VALUATION OF PROPERTY 463-71. For a discussion of the problem by a key advisor to the Director of Revenue 1943-1949, see STILES, "FULL FAIR CASH VALUE" IN THE 1945 ILLINOIS ASSESSMENT EQUALIZATION PROGRAM, XXXII BULLETIN OF THE NATIONAL TAX ASSOCIATION 34, 38-40 (1946). In 1946 the National Association of Assessing Officers sponsored a panel discussion on "What Weight Should Assessors Give to Current Real Estate Prices in Determining Assessed Valuations?" ASSESSMENT ADMINISTRATION: 1946. In June 1954 the Committee on Sales Ratio Data of the National Association of Tax Administrators issued "Guide for Assessment-Sales Ratio Studies." Such studies measure the relation of current real estate sales prices to assessment. Chaired by the Director of Revenue's staff assistant in charge of the Chicago office of the Property Tax Division, E. L. Maynard, the Committee stated in its introduction: "The committee in presenting these suggestions is not proposing to say how the results of such studies are to be used, but would like to point out that sales ratio studies provide a wealth of information to tax administrators and taxpayers." Peo. Ex. 52. I Exhibits. In August 1956 the Ratio Study Committee of the National Committee of Railroad and Public Utility Tax Representatives issued a re-

Following World War II, local assessors did not increase assessments as the price level escalated. The explanation involves political considerations.[14] Thus the legal onus was placed on state tax administrators to raise local assessments in the counties to the legal standard, an exceedingly difficult matter because of unrelenting inflation and political reality.

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port detailing assessment sales ratio findings in many states. In 1957 the Bureau of Census published TAXABLE PROPERTY VALUES, predicating its findings on level of assessment and value of locally assessed real property on "spot" prices. In May 1957 the University of Kentucky published for its Bureau of Business Research THE CONFLICT BETWEEN LAW AND ADMINSTRATIVE PRACTICE IN VALUATION OF PROPERTY FOR TAXATION IN KENTUCKY by Dr. John Shannon. At 39-42 the author discussed the "normal value" argument and urged its abandonment as theoretically unsound and subjective in nature. In 1962 the Bureau of the Census issued its second TAXABLE PROPERTY VALUES predicated upon value equaling current price. In 1963 the Advisory Commission on Intergovernmental Relations published THE ROLE OF THE STATES IN STRENGTHENING THE PROPERTY TAX, which accepted and utilized locally assessed property values based on the "spot" prices employed in Bureau of Census studies. In 1965 as Senior Analyst, Advisory Commission on Intergovernmental Relations, Dr. Shannon wrote: "This theory undoubtedly made a deep impression on assessment officials and also provided them with a convenient and apparently plausible rationalization for failing to adjust tax assessments to the dramatic advance in property values, particularly between 1946 and 1952 . . . . Although the normal value theory may have had some technical plausibility immediately after World War II, it has since become thoroughly discredited. . . ." "Conflict Between State Assessment Law and Local Assessment Practice," a Paper delivered before the Conference on "Property Taxation U. S. A." at Milwaukee, June 1965.

The actions of many state legislatures in providing for official sales ratio studies following World War II indicate that they believed current prices were at least pertinent in the determination of value. See GRONOUSKI, EQUALIZATION PROGRAMS AND OTHER STATE SUPERVISORY ACTIVITIES IN THE PROPERTY TAX FIELD 13-20 (1957) (Federation of Tax Administrators).

[14] "To assess property at its market value at a time when inflation has skyrocketed the cost of small homes might easily increase the cost of real estate to the point where many lower-income and middle-income people could not afford home-ownership. The tax assessor undertaking such a project would be inviting political if not personal disaster." Louisville Courier-Journal, February 5, 1953 (editorial).

If a state tax administrator during the post-World War II period had increased local assessments to the legal standard on the theory that current price equals value, the following consequences were seen to threaten. Voter resentment directed against the state administration would develop.[15] State aid to the local tax districts, if affected by the level of assessment, might decrease.[16] An amalgam of such factors explains why the Directors of Revenue of Illinois have never equalized county-wide local assessments according to full value based on current sales prices. See pp. 48-58 *infra;* n. 9 at 9 *supra.*

To admit on the record that the Director of Revenue was ignoring inflation in certifying equalization multipliers to the counties would invite colorable accusation of malfeasance. Moreover, in a state such as Illinois, where the political power structure underlying state government is dependent upon accommodations between Cook County and Downstate Illinois, political adversaries of the state administration could use the admission to advantage. Perhaps the least objectionable prescription for such a difficult situation has been seen to be official silence on all sides as local government needs are met by practical agreements between contending power blocs. To admit that the Directors of Revenue, in order to be fair, were also ignoring inflation in assessing railroad property would also invite colorable accusations of malfeasance for deviating from

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[15] See n. 9 at 9 *supra.*

[16] From 1948 to 1958, state aid to local school districts in Illinois increased from $28,330,000 to $104,485,000, with about 32% of the total going to Cook County. The proportion of total school district revenues received from the state was larger at all times during this period in Downstate Illinois. By 1963 state aid to local school districts had increased to $169,976,000, with the percentage going to Cook County increasing to about 38%. ILLINOIS SCHOOL PROBLEMS COMMISSION No. 7, p. x (1963). See n. 30 at 58 *infra.*

the legal standard of assessment. See Appendix E, Jurisdictional Statement A-51.

The dilemma created by the conflict of law and assessment practice engulfed the Directors of Revenue of Illinois increasingly as the price level continued to inflate after 1948. The dilemma intensified for successive state administrations. The CB&Q, C&NW and the GM&O exploited this dilemma in building judicial records.

Utilizing the Director of Revenue's own data proving that the state-certified multipliers did not increase county assessments as inflation continued, the railroads sponsored an independent economist to testify on the value of locally assessed property based exclusively on that data, increasing value. With regard to the value of their own property, the three railroads simply asked a loyal civil servant, the "Supervisor of Railroad Assessments" 1949-1960, whether certain of the Directors' assessments of their property equalled full value. Really, the railroads were asking Raymond S. Danis, "Have you and your Chief complied with the statute?" The answer was "Yes." Raymond S. Danis, the witness, was not only caught between the countervailing moral forces of truth, loyalty to his Chief, and self-interest but also he was pressed down by earlier entrapment.[17] In 1966, before this Court, despite the data and insight provided by a detailed, specific record, the

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[17] Railroad entrapment of state tax administrator Raymond S. Danis, a staff aid, occurred before a staff legal aid of the Director of Revenue of Illinois in January 1954. In January 1954, as the instant record now proves, the Director had been, since the late 1940's, ignoring inflation in the valuation of locally assessed property for equalization purposes and in the assessment of railroad property. In 1953, as the instant record now proves, the Director had applied a "judgment factor" to reduce the formulaic average of the elements of value for the C&NW's property by $10,980,000, which was $6,086,000 more than the "judgment factor" reduction applied to reach the 1952 tax assessment,

railroads advance this bare **conclusion** as a ground for avoiding plenary consideration of the questions presented. See Appellees' Motion at 17, lines 21-23; at 35, lines 29-31;

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the increase in reduction eliminating an increase in the formulaic average of $5,086,000 for 1953 over 1952 and reducing the 1952 assessment by $1,000,000.

Following an official newspaper publication during late 1953 of the Director's "original" assessments of railroad property for 1953, the Chicago and Northwestern Railroad, pursuant to Ill. Rev. Stat., ch. 120, § 618 (1963) applied for "a review and correction" of the Director's "original" assessment, claiming only that the assessment was in excess of the statutory standard of full value. In January 1954 Raymond S. Danis, the Director's staff "railroad assessor" since 1949, was on the witness stand under oath. The following exchange, which occurred on cross-examination of Mr. Danis, helps explain all the subsequent testimony of Mr. Danis in the courts of Illinois 1959-1961 that certain of the Directors' assessments of railroad property of the C&NW, GM&O and CB&Q were at full value:

> **Cross-Examination of Raymond Danis by Railroad Counsel:**
>
> "Q. You said, Mr. Danis, that your assessment method was uniform among railroads as a class?
>
> "A. That's right.
>
> "Q. Am I to understand from that you would assess railroad property on a different basis in relation to its fair cash value than other property?
>
> "Mr. Ice [Director of Revenue's legal advisor and hearing officer]: Well, Mr. Trottman, I'll have to object to that for this reason: Mr. Danis works on nothing but railroad assessments. He can't very well answer about other property, I don't think. [Danis was directly responsible to the same official who certified multipliers to the counties for locally assessed property.]
>
> "Mr. Trottman [Rr. counsel]: At any rate, **you regard the assessment at the full, fair cash value of the property?**
>
> "The Witness: A. **Yes.**
>
> ". . ." (R. 87-88 of C&NW v. Dept. of Revenue, 6 Ill. 2d 278, 1955, Docket No. 3510, Vault No. 58173.)

This testimony under oath protected the Director of Revenue and was the perfect answer to serve the railroad's interest in uniformity litigation. The testimony elicited by railroad counsel committed the administrative aid to the **conclusion** that railroad property for 1953 bore 100% level of assessment, even though on the issue then at hand it was in conflict with the railroad's contention that its property assessment exceeded value; in eliciting it, the railroad weakened its case. The C&NW

and at 37, lines 29-32. The trial court was not governed by this type of evidence. Jurisdictional Statement A-27.

III. THE JUDGMENTS BELOW RESULT FROM AN APPLICATION BY THE SUPREME COURT OF ILLINOIS OF THE UNIFORMITY CLAUSE IN ARTICLE IX, SEC. 1 OF THE ILLINOIS CONSTITUTION TO THE FACTS OF THE CASE.

The railroads deny that the refunds awarded them by the trial court and increased by the Supreme Court of Illinois derive from judicial vindication of their constitu-

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foray of 1954 was repeated by the CB&Q on January 9, 1958, when the Director's 1957 assessment of the CB&Q's property was the subject of an administrative hearing before the same hearing officer who presided in 1954, Mr. Ice. At this time, as the instant record now proves, the Directors for almost a decade had been ignoring inflation in equalizing locally assessed property, and the "judgment factor," applied to reduce the average of the elements of value to produce the CB&Q's property assessments, had increased from $20,157,000 in 1951 to $47,983,000 in 1957.

Cross-Examination by Railroad Counsel:

"Q. Mr. Danis——

"A. Yes, sir.

"Q. ——is it correct to say that the task of the Department of Revenue in making assessments of this nature, is to ascertain the fair cash market value of the railroad property, subject to assessment?

"A. Yes . . .

"Q. **But** the end result of what you propose, or **what you do here is to arrive at a fair cash value**, . . .? [See the same question asked in Tennessee in 1965 at 22 *infra*.]

"A. I presume that that is correct." R. 442, 17 Ill. 2d 376 (1959) (Docket No. 35055, Vault No. 58949).

The inadequate records in these two administrative hearings were the bases of two Supreme Court of Illinois decisions. The second decision at 17 Ill. 2d 376 was handed down on September 24, 1959. The court's opinion did not address itself to the equalization duties or conduct of the Director as regards locally assessed property, and at 391 uttered the *dictum* that on statutory levels the Director could not assess railroad property at less than full value. Twenty-seven days later on October 22, 1959, Mr. Danis appeared in Madison County for a judicial hear-

tional rights. At 18-20 their contention is explicit; relief is based on *People ex rel. Callahan v. GM&O Rr.*, 8 Ill. 2d 66 (1956) (Dailey, J.) (relief denied on pleadings) and

> "Under Callahan there resulted constructive fraud as a matter of Illinois law, without regard to any provision of the Illinois or Federal Constitutions."

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ing on uniformity issues, and with Mr. Ice present testified that the Director's assessments of the property of the GM&O 1952-1957 were at full value. In October, 1959, the Director, as the instant Record now proves, was still ignoring inflation in the equalization of locally assessed property, and the "judgment factor" reductions applied to the elements of value to reach assessments of the GM&O's property had increased from $8,867,000 for 1951 to $26,088,000 for 1957. (The failure of the Directors to implement the full value legislation had not yet been adjudicated by the Judiciary and it was *sub rosa*.) Notwithstanding the railroads' leverage on him, Mr. Danis testified in October, 1959, when he was pressed by railroad counsel:

> "Q. I . . . ask if the figures on these various notices were not final assessments made of the GM&O for [1953-1957] at full, fair cash value?
>
> . . .
>
> "Q. Well, in your opinion, do they represent the full, fair cash value of the railroad for the years mentioned?
>
> "A. This represents the full **assessed** valuation as certified or as—on which the notice was given to the railroad for the years in question, yes.
>
> . . .
>
> "Q. . . . And that in your opinion represented its full, fair cash value of the railroad for each of those years, did it not?
>
> "A. Well, the letter states that its the full **assessed** valuation.
>
> "Q. Well, can you answer my question?
>
> "A. Yes.
>
> "Q. It does represent, then, in your judgment——
>
> "A. In the Director's judgment, it represents the full, fair cash value.
>
> . . .
>
> "A. No, in the end it is his [the Director's]. In the end it is his judgment.
>
> "Mr. Gillespie: That's right. I think that's all.
>
> "Mr. Dobbs: It does represent full fair cash value?
>
> "A. Yes . . ." Rr. Ex. 76, pp. 33-5. XI Exhibits.

Cf. n. 28 at 52 *infra*. Appellees, at their n. 10, pp. 18-19, stress orders entered on November 3, 1959, less than two weeks after Danis' testimony, without mentioning that the People were

At 31 Appellees state that *Hillison* was not founded on "Constitutional grounds." Similarly do the railroads describe the basis of *Kohorst* at 33 and of *Korzen* at 37.

We invite this Court to consider an earlier interpretation of the nature of the taxpayer's right, which was

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represented at the hearing by Dick H. Mudge, Jr., State's Attorney, whose brother, John Mudge, Esq., the Assistant State's Attorney conversant with the litigation, had died prior to Danis' appearance in Madison County. See Jurisdictional Statement A-16.

On January 21, 1960, three months later, with Mr. Ice still the Director's legal aid, now also "Special Assistant Attorney General" (not "Assistant Attorney General" as represented by the railroads at 31 of their Motion), Danis gave testimony in a second judicial proceeding involving uniformity issues, the trial in Hillison, 22 Ill. 2d 88 (1961). Danis stated that the 1958 assessment of the CB&Q, $147,000,000, was at full value. But he also responded to the leading interrogation of Mr. Ice, communicating the Directors' policy of holding the line:

> "Q. Well, now, when you made this recommendation of $147 million to the director, for 1958, for the Burlington, **were you influenced in arriving at that figure by the knowledge that he wouldn't want that assessment increased,** or by the knowledge of this continuity that you spoke of, **or by a knowledge that maybe that was done for other railroads, too, this judgment reduction?** R. 1413. III Testimony.
>
> . . .
>
> "Q. I mean, **was your recommendation influenced by that knowledge** that these things were to be considered, **such as no increase in the assessment and continuity of assessments,** and the other railroads would be based by it from their mathematical average by a judgment factor; was your recommendation of $147 million influenced by these considerations? R. 1413. III Testimony.
>
> "A. **More or less.** The debasement factor is not a constant factor for all roads. Every railroad will vary in debasement . . . (R. 1413) (III Testimony) [depending upon the mathematical interrelationship of the three elements of value for each railroad's property in each year] R. 1413, III Testimony.
>
> "Q. Well, if you were just valuing this railroad as an independent proposition **not having to be restrained by continuity and the question of what is done for other railroads,** would you think $147 million was a fair valuation or a low one?
>
> "A. Well, if this was an original valuation, I would say it was low . . . **I think the Legislature has already given the**

not vindicated in *Callahan* but which was later vindicated in *Hillison* and *Kohorst* and in the subsequent decisions leading to the case at bar. James R. Parham, Esq., one of the three counsel of record acting here on behalf of all

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> **railroads a definite valuation advantage over real estate by requiring income and market values to be considered in the case of railroads. If you valued railroads on a cost basis as is generally done in the case of real estate, then even the formula evaluation would be substantially low for full value** . . ." (R. 1413-14) (III Testimony).

Hillison has led finally to the case now at the bar of this Court. See pp. 64-67 *infra*.

Identical to the Danis entrapment was the recent colloquy during an administrative hearing on October 25, 1965, before the Tennessee State Board of Equalization sitting in review of the 1965-1967 assessment of the property of the Louisville and Nashville Railroad previously made by the Public Service Commission of Tennessee:

> "Mr. Clyde W. Key [railroad counsel asks this first question on cross-examination]: May I ask Dr. White a couple of questions? [[Dr. White, the tax and rate consultant to the Public Service Commission.]]
>
> "The Chairman [of the Board of Equalization]: Yes, sir.
>
> "Mr. Key: Dr. White, **your ultimate goal is to reach actual cash market value after application of** your seventy percent factor, and **your judgment factor is that correct?** [See the identical type question asked in Illinois in 1954 and 1958 *supra*.]
>
> "Mr. White: **Yes, sir.**
>
> "The Chairman: **Mr. Key, you** know we are not going to **admit** anything except one hundred percent assessment." Jurisdictional Statement A-57-8.

This testimony appeared at 5 of the 80-page Proceedings. At 11 L&N's attorney delusively conceded, "And as I say, we really think that the value there was excessive, but we have concluded that we are not, for the purpose of this hearing, **we are just going to concede that they did their duty full well in reaching one hundred percent actual cash value.**" L & N Rr. v. State Board, et al., 249 F. Supp. 894 (M. D. Tenn. 1966), appeal docketed, 6th Cir., April 4, 1966. The quoted testimony under oath in Tennessee contributed to federal court intervention in 1966, with the railroad proving on the pleadings studies based on inflated prices that locally assessed property was equalized at far less than full value and the railroad's property assessment was at 100% of value. The federal judge did not have before him the data or methodology of railroad property assessment over a significant period of time. Jurisdictional Statement A-53.

twelve Appellees, authored *Taxation of Property in Illinois, U. Ill. L. F.* 645, 646, 647 (1961) published following May 17, 1961, the date on which the Supreme Court of Illinois denied rehearing in *Hillison* and *Kohorst,* 22 Ill. 2d 88, 104. Mr. Parham, who, for several years has been a member of the board conducting the affairs of the Section of State Taxation of the Illinois State Bar Association, wrote in 1961:

> "Since the first constitution of this state adopted in 1818, the cardinal principle of general property taxation has been equality and uniformity as to assessments. . . .[5] In numerous cases, the Illinois Supreme Court has held that all taxing laws must be subordinated to this constitutional mandate, including laws requiring full-value assessments.[6] . . . **In those cases [Hillison and Kohorst] the railroads filed objections to the taxes extended against the state-assessed valuation of their operating property on the ground that** such property had been valued at 100% of full, fair cash value by the Department of Revenue, whereas locally assessed property, even after giving effect to the equalization multipliers, had been

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"[5] Illinois Legislative Council Publication No. 134, Constitutional Mandates for Uniformity of Taxation. [This 28-page document is devoted to exposition of the uniformity clause in Article IX, Section 1 of the Illinois Constitution, and comparable constitutional provisions in other states. The Summary at i-ii includes "2. Illinois is one of a small group of states (no more than five according to one count and certainly no more than 13 by any test) mandating a general tax under which all classes of property are to be taxed on the same uniform basis and in proportion to value. (Among even these states, Illinois ranks as having one of the most rigid uniformity roles.) . . . 7. In Illinois a constitutional amendment is quite clearly required if there is to be any consequential relaxation of the rule of uniformity in taxation. . . ."]"

"[6] [citing five cases decided by the Supreme Court of Illinois in 1945, 1944, 1934 and 1932, including People ex rel. Tedrick v. Allied Oil Corp., 388 Ill. 219 (1944);]" See pp. 25-26 *infra.*

> assessed at a level far below full value, **in violation of the uniformity clause of the Illinois Constitution** and the full value assessment provision of the Revenue Act. **The Supreme Court held that these objections should have been sustained.**" (Emphasis added.)

The counterfeit argument of the railroads to this Court, that the relief granted them by the Illinois judiciary is not based on a constitutional provision, undermines the foundations of the very judgments which benefit them. Article IX, § 1 of the Illinois Constitution provides that the property tax shall be administered by such person or persons as the legislature shall direct. Indeed, the railroads have emphasized the pertinent language at their 39. The legislature elected by the People has directed that the Director of Revenue shall administer the property tax. Therefore, the Supreme Court of Illinois has no power to interfere with the administration of the property tax by the Governor's appointee unless he has violated a taxpayer's statutory or constitutional right. Only if the Director of Revenue has violated such a right does the Judiciary have power to interfere pursuant to the Constitution's having vested the "judicial power" in the Judiciary. Art. VI, § 1. Here no statutory right of the railroads is involved, for they do not complain that the assessments of their property violated the statutory standard of assessment. They complain of discrimination, and Appellant is unaware of any common law doctrine that protects the property taxpayer against discrimination at the hands of the administrative process. In short, one fallacy of the railroads' argument that judicial action below does not rest on a constitutional basis is suggested by considering the argument's logical terminus: the judgments appealed to this Court constitute a usurpation of power by the Supreme Court of Illinois.

The big two of Illinois railroading, the CB&Q and the C&NW, early moved the Supreme Court of Illinois to

grant them relief from property tax discrimination resulting from disparate levels of assessment borne by their property and non-railroad property. The basis of this relief in 1867 was unequivocally and explicitly the uniformity clause in Art. IX, sec. 1 of the Illinois Constitution of 1848, later carried over into the 1870 Constitution. Justice Sidney Breese wrote, "The great central and dominant idea in that instrument is, uniformity of taxation"; describing "the principle of uniformity of taxation as the central and dominant object of the constitution in the assessment of taxes." 44 Ill. 229, 238, 240 (1867). Decisions of the Supreme Court of Illinois which have explicitly enforced the state constitutional command of uniformity in property taxation are: (a) at the instance of state assessed taxpayers: *Law v. People ex rel.*, 87 Ill. 385, 404-06 (1877) (rr. property); *People v. I. C. Rr.*, 273 Ill. 220 (1916); *People v. I. C. Rr.*, 355 Ill. 605, 612 (1934); *People ex rel v. Grand Trunk Rr. Co.*, 357 Ill. 493, 498 (1934); *Mobile & Ohio Rr. Co. v. Tax Com.*, 374 Ill. 75 (1940); *Ross v. Rr.*, 381 Ill. 58, 62 (1942); at the instance of locally assessed property taxpayers: e.g., *Bureau County v. CB&Q Rr.*, 44 Ill. 229, 238 (1867); *C&NW v. Boone County*, 44 Ill. 240 (1867); *C&A Rr. Co. v. County*, 68 Ill. 458, 560 (1873); *Keokuk & Hamilton Bridge Co. v. People*, 145 Ill. 596, 606 (1893); *First Nat'l Bank of Urbana v. Holmes*, 246 Ill. 362, 366 (1910); *People ex rel. v. Keokuk & Hamilton Bridge Co.*, 287 Ill. 246, 250 (1919); *People ex rel. Miller v. CB&Q*, 300 Ill. 399, 405 (1921); *Bistor v. McDonough*, 348 Ill. 624, 632 (1932); *People ex rel. v. Wiggins Ferry Co.*, 357 Ill. 173, 180 (1934).

In other decisions of the Supreme Court of Illinois, the clear command of the state uniformity clause has been carried out by describing unconstitutional discrimination as "constructive fraud." In *People's Gas Light Co. v. Stuckart*, 286 Ill. 164, 177 (1919), the state assessed tax-

payer complained of discrimination and the court, citing explicit uniformity clause cases, vindicated the constitutional right, stating that the taxpayer had been "knowingly and intentionally discriminated against and the result was a fraud upon it." In *People ex rel. Wangelin v. Wiggins Ferry Co.*, 357 Ill. 173, 180, 181 (1934), the court described discrimination violative of the state uniformity clause as "constructive fraud." And a decade later the court below wrote "excessive valuation knowingly and intentionally made in violation of the constitutional rule of uniformity amounts to a constructive fraud. . . ." *People ex rel. Tedrick v. Allied Oil Corp.*, 388 Ill. 219, 225 (1944). The labeling of such unconstitutional discrimination is meticulously traced in "'Overassessment' and 'Discrimination' Issues in the Supreme Court of Illinois, 1859-1959," which is Appendix A, People's Second Brief in the Supreme Court of Illinois. II Ill. Sup. Ct. Rec. 88.[18]

Any doubt that the judgments below rest on the uniformity clause of the state constitution is removed by the opinion of the Supreme Court of Illinois per Justice

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[18] Appellees have filed with the Clerk of this Court nine copies of their Motion to Strike the Appellant's Second Brief, filed in the Supreme Court of Illinois on May 10, 1965. This Motion is at II Ill. Sup. Ct. Rec. 100-111. Since the Motion describes the People's Second Brief as an "imposture" (p. 2), and a "contemptuous disregard of the Court's rules and impudently exploits the permission granted" (p. 5) and states that the railroads did "Not Confess Weakness by this Motion" (p. 109), Appellant is constrained to invite the Court's attention to several facts. The railroads have failed to mention, much less supply, copies of the comprehensive Suggestions in Opposition to the Railroads' Motion to Strike filed on May 10, 1965, now with the Clerk of this Court as II Ill. Sup. Ct. Rec. 113-133. Those Suggestions reveal that the railroads' Motion to Strike the People's Second Brief did not faithfully report crucial words of the Chief Justice of the Supreme Court of Illinois. Compare II Ill. Sup. Ct. Rec. 117 with id. at 101, and that the Motion contained other distortions and inaccuracies. Further, the suggestions contained explicit and pertinent citation and argument about the constitutional nature of the litigation. II Ill. Sup. Ct. Rec. 127-133. See also I Ill. Sup. Ct. Rec. 23, 24, 25, 26-61.

Schaefer in *CB&Q v. Dept. of Revenue*, 17 Ill. 2d 376, 161 N. E. 2d 638 (1959), which is not faithfully quoted or interpreted by the railroads at 29-39, 19 of their Motion.[19] In *CB&Q*, the railroad argued that reproduction cost should be eliminated as an element of value. Justice Schaefer's opinion rejected the argument. Second, the CB&Q argued that the level of assessment of locally assessed property for 1955 was about 50% of full value and that the railroad's assessment for 1957 was at full value. Justice Schaefer wrote that if the railroad could prove that the level of assessment of locally assessed property for 1957 was at 50% of full value, "**the plaintiff's operating property is bearing a disproportionate share of its tax burden in violation of the constitutional requirement of uniformity. Art. IX, Sec. 1, Const. 1870; People ex rel. Callahan v. Gulf, Mobile and Ohio Railroad Co., 8 Ill. 2d 66 . . .**," 17 Ill. 2d 376, 390. Justice Schaefer did not deny the constitutional right, nor did he indicate the extent of discrimination. He acknowledged the source of the right, and refused relief only because the proof was inadequate, adding that the proper method by which to vindicate the constitutional right was in tax objection proceedings.[20]

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[19] *E. g.*, The railroads at 29 describe CB&Q v. Dept. of Rev., 17 Ill. 2d 376 (1959) as the "Burlington 1957 Valuation Case" and overlook the date of the decision. Justice Schaefer's opinion for the Court was filed on September 24, 1959, 18 months before the decisions in Hillison and Kohorst. The case involved tax year 1957. Perusal of Justice Schaefer's opinion in the 1959 Burlington case and in C&NW v. Dept. of Revenue, 6 Ill. 2d 278 (1955) cert. denied, 351 U. S. 950, rehearing denied, 352 U. S. 859 (1955), reveals sound analysis. These two cases involved direct appeals from the Director's assessments contending that the respective railroad property assessments were higher than the statutory standard of fair cash value (full value) because reproduction cost was utilized as an element of value. See n. 4 at 4 *supra*.

[20] Justice Schaefer's opinion for the court below in 1959 stated that the proper method by which to test the issues of unconstitutional discrimination was in a tax objection case. At 391 the opin-

Even *Callahan,* now relied upon by the railroads to deny the constitutional basis of the judgments below, referred to "Section 1 of Article IX of the Illinois Constitution" in a sentence overlooked by the railroads, though it immediately follows the language from the *Callahan* opinion quoted by the railroads at their 27-28. Moreover, a dissenting opinion in *Callahan* by Justice Hershey (who later wrote the court's opinion in *Hillison*), at 8 Ill. 2d 66, 72, refers to the right as a constitutional one.

The six interrelated decisions of the Supreme Court 1961-1965, which grant relief to the railroads, render it clear that the basis of relief in all six cases is constitutional. First, the court below decided *People ex rel. Kohorst v. GM&O v. C&NW,* 22 Ill. 2d 104 (1961) (House, J.); *People ex rel. Hillison v. CB&Q,* 22 Ill. 2d 88 (1961) (Hershey, J.) on March 29, 1961. Both appeals had been filed in the supreme court below from two different counties in October 1960. At 105 Justice House wrote, "**We have jurisdiction because** the revenue is involved and **constitutional questions are presented,**" and at 113-4, the opinion refers to achieving "**uniformity**" and eliminating "**discrimination.**" At 96 Justice Hershey wrote of the constitutional requirement of uniformity. In *People ex rel. Enrietta v. GM&O,* 29 Ill. 2d 605 (1964) (House, J.) the court at 610 referred to "**discrimination . . . amounting to constructive fraud.**" In *People ex rel. Korzen v. CB&Q,* 32 Ill. 2d 554 (1965) (House, J.), the opinion refers to "**discrimination.**" In the case at bar, Justice House's opinion, set forth in the Jurisdictional Statement,

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ion stated the *dictum* that the Department has "no authority to reduce its assessed valuation of the plaintiff's property to less than full value." The citation of authority and reasoning at 390-391 establishes that the intellectual process was based on statutory provisions. The record then before the court was limited, being confined to the assessment of one railroad's property, and was presented at a time when no organ of state government had admitted or declared that the assessments of locally assessed property had since 1946 been equalized by the Director at less than full value.

referred to **discrimination** twice at A-2, and again at A-14, and also acknowledged the argument about "**constitutional compliance**" at A-4.

Finally, the trial court specifically cited the state uniformity clause as pertinent. Jurisdictional Statement A-21, 35.

The railroads appear to argue at 29 that a new right for property taxpayers was created by *Callahan* and *CB&Q* (1959). In *CB&Q v. Dept. of Rev., 17 Ill. 2d 367 (1959)* the court below uttered a *dictum* that the Director on statutory levels could not debase railroad assessments from full value, and must therefore equalize locally assessed property at full value. See n. 20 at 27 *supra*. The railroads now argue that because the relief for railroads is to be determined by recomputing the railroad taxes on the premise that all property in Madison County has been equalized and assessed at full value, thereby producing lower tax rates to be applied against the full value of railroad property, rather than by reducing railroad assessments and subjecting them to the higher rates actually extended, a new non-constitutional right was created. The argument is specious. The method of computing tax refunds for discrimination from disparate levels of assessment violative of the state constitutional uniformity clause involving railroad property and non-railroad property is irrelevant to the source of the right. The difference between the two approaches of measuring the refund suggests the difference between Tweedledee and Tweedledum.

As long ago as 1877, this Court stated on the issue of appellate jurisdiction that "Any enactment, from whatever source originating, to which a state gives the force of law is a statute of the state . . .," mentioning constitutional provisions. *Williams v. Bruffy*, 96 U. S. 176, 182-3 (1877). *Accord, Ohio ex rel. Bryant v. Akron Park Dist.*, 281 U. S.

74, 77, 79 (1930). Can there be any doubt, for example, that the appellate jurisdiction of this Court would encompass an asserted invalidity of an application of a state constitutional provision requiring segregation of the races in the public school system or one requiring legislative apportionment based on financial resources of voters above the age of forty? Appellant contends that the application by the court below of the uniformity clause in the Illinois Constitution is repugnant to the Fourteenth Amendment.

IV. APPELLEES' POINT I REFLECTS NO COMPREHENSION THAT THIS COURT TRADITIONALLY DECIDES CONSTITUTIONAL QUESTIONS RAISED BY CONCRETE APPLICATIONS OF STATE LAW RATHER THAN HYPOTHETICAL QUESTIONS RAISED FROM THE FACE OF THE PROVISION IN QUESTION.

At their 7 the railroads argue an irrelevancy, *i. e.*, Appellant makes "no claim . . . . that the state laws per se are repugnant to the Constitution or laws of the United States," and immediately follow the irrelevancy with a *non sequitur*: "Thus no grounds exist for direct appeal to this Court under Section 1257 (1) and (2) of the Judicial Code of 1948 [28 U. S. C. A., Sec. 1257 (1) and (2)]."

Appellant contends in support of jurisdiction that the application of the uniformity clause of the Illinois Constitution, valid on its face, to the facts of record has produced Supreme Court of Illinois judgments which, together with the application, are repugnant to the Fourteenth Amendment. Appellees overlook the settled law that "Appeal as of right may be taken to the Supreme Court in certain circumstances even though the particular state statute involved is valid on its face and would be immune to any attack in respect of its ordinary application. 'A statute may be invalid as applied to one state of facts and

yet valid as applied to another.'" ROBERTSON & KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES 21, § 11 (2d ed. Wolfson & Kurland 1951) (footnotes omitted). In *Dahnke-Walker Co. v. Bondurant*, 257 U.S. 282, 289 (1920), the Court wrote, "That the statute was not claimed to be invalid in toto and for every purpose *does not matter* . . .," and sustained jurisdiction under the 1921 counterpart of 28 U. S. C. § 1275 (2). More recently, a railroad docketed an appeal from the Supreme Court of Tennessee and contended this Court's appellate jurisdiction was properly invoked because the state supreme court had applied a state law in such a manner as to conflict with the Fourteenth Amendment. The People argued that this Court had no jurisdiction because the statute was valid on its face. Consideration of jurisdiction was ordered postponed to the hearing on the merits. The Court sustained the railroad's contention and held there was jurisdiction, stating, "A statute valid as to one set of facts may be invalid as to another." *Nashville, C. & St. L. Rr. v. Walters*, 294 U. S. 405, 415 (1935). See Jurisdictional Statement 19. Indeed, Mr. Justice Black, Mr. Justice Clark and Mr. Justice Harlan have recently expressed concern about deciding the validity of hypothetical applications of enactments. *Brown v. Louisiana*, 34 U. S. L. Week 4143, 4153 (U. S. February 22, 1966) (dissenting opinion); *United Mine Workers v. Gibbs*, 34 U. S. L. Week 4343 (U. S. March 28, 1966) (concurring opinion).

The logical consequence of the traditional approach of the Court is that the first two of the questions presented at 7-8 of the Jurisdictional Statement, dealing with concrete applications of Illinois uniformity clause, more forcefully fall within the reach of Congressional provisions defining the appellate jurisdiction of this Court than would speculative applications of the uniformity clause not involved in the Record.

V. CERTAIN INELUCTABLE FACTS EMERGE FROM THE RECORD TO FRAME THE QUESTIONS PRESENTED.

1. The Directors of Revenue of Illinois, 1949-1962, ignored price level increases (inflation) both in equalizing locally assessed property and in assessing railroad property. See pp. 48-[illegible] *infra*.

2. The trial court, in order to enforce the state uniformity clause, at the instance of the railroads followed four prior Supreme Court of Illinois decisions, and in deriving levels of assessment rejected the Directors' elimination of price increases (inflation) in valuing locally assessed property; and at the instance of Appellant the trial court, in deriving levels of assessment, uniformly rejected the Directors' elimination of price increases (inflation) and property acquisitions in valuing railroad property, ordering a 25% refund. (Jurisdictional Statement A. 16-44.)

3. The Supreme Court of Illinois, in order to enforce the state uniformity clause at the instance of the railroads, reversed the trial court, holding in effect that railroad property valuations should not reflect price level increases and net property acquisitions, and ordering a 50% refund. See pp. 63-70 *infra* and Jurisdictional Statement A. 2-15.

4. The Supreme Court of Illinois, in determining valuations of railroad property *de novo* for the purpose of enforcing the uniformity clause, utilized the huge "judgment factor" reductions employed by the Directors in their assessments, even though there is no evidence to support these reductions, except for rationalizations, the validity of which is destroyed with data accumulated by the same administrative staff aid who offered the rationizations. See Appendix E, F, Jurisdictional Statement A. 51-2.

Paragraphs 1, 2 and 3 above frame the questions presented involving both the Due Process and the Equal Protection Clauses. Paragraph 4, the Due Process Clause alone. The verity of the contents of paragraphs 1, 2, 3 and 4, obscured by the railroads' Motion, is established at 48-70 *infra*.

VI. THE RAILROADS' CONTENTION THAT INFLATION HAS NOT INCREASED THE VALUE OF THEIR PROPERTY RESTS ON AN INARTICULATED PREMISE WHICH BEGS THE QUESTIONS PRESENTED; THE IRRELEVANT FACTUAL PRESENTATION OFFERED TO SUPPORT THE CONTENTION IS DELUSORY.

The railroads' thrust at 9-11 is that sustained price level increases for commodities and factors of production which constitute the inflation characterizing the economy since 1946 have not, despite increased investment and modernization, served to increase the value of railroad property. The assertion is in conflict with the facts.[21] The rail-

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[21] In n. 15 at 26 of the Jurisdictional Statement Appellant referred to an increase in the "book" value of railroad property of some 8.3 billion 1946-1961; however, that increase is only the amount of property additions after credit for retirements. Between 1956-1960 alone, capital investment by railroads in new plant and equipment amounted to 5.3 billion. Survey of Current Business, July, 1959, p. 30, Table V-7; September, 1961, p. 6, Table 1.

On March 4, 1966, Mr. Daniel P. Loomis, President of the American Association of Railroads since about 1958, told the National Defense Transportation Association's 3rd European Regional Conference in London about the "technological revolution" and the "pricing revolution" which have been taking place among the 76 major railroads of the United States. (The Association's [AAR's] members own 95% of the railroad mileage and carry 99% of the line haul freight and passenger traffic in the United States.) Mr. Loomis reported "our technological changeover is being fueled by a railroad financed capital improvement program that has involved $22 billion over the past two decades and has now reached a record rate. . . ." Address, "World Railroad Renaissance: Beacon Hope for the Transport Future," 112 CONG. REC. A. 1220 (daily ed. Mar. 7, 1966). Recently, AAR explained

roads' thrust is even deeper and more convoluted: the railroads argue that inflation and increased investment have not prevented the value of their property from decreasing since the mid and late 1950's. They contend that

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"The amount of capital spending by Class I railroads fails to portray the full magnitude of railroad modernization programs today, since much new equipment is being installed by railroads under leasing arrangements or is being put in service under private reporting marks. The total value of railroad plant and equipment placed in service in 1965, including that which does not show in investment accounts of Class I railroads, was probably close to $2 billion." Behling, A REVIEW OF RAILROAD OPERATIONS IN 1965 (AAR Special Series No. 100; L. C. Card. No. A28-130). Modernizing capital expenditures, not including those made by lessors and private car lines, for equipment and roadway and structures, 1950-1964, are set forth at 17 of YEARBOOK OF RAILROAD FACTS (AAR, 1965 ed.).

On January 13, 1958, Mr. Loomis told Congress, ". . . the fact that the railroads have made capital expenditures in the 12 years since the war [of] approximately $13½ billion, certainly manifests a determination to modernize and improve the railroad plant . . . These expenditures have brought about almost complete dieselization of the railroad system. They have brought in new push-button yards, extension of centralized traffic control, improved railroad beds, and communications, mechanization of construction and maintenance work; modernized rolling stock." HEARINGS ON PROBLEMS OF THE RAILROADS BEFORE THE SUBCOMMITTEE ON SURFACE TRANSPORTATION OF THE SENATE COMMITTEE ON COMMERCE, 85TH CONG., 2ND SESS., VOL. I, 31 (1958) (no significant assertion or concern that railroad property was being victimized by state tax administrations in managing the property tax.) For the sudden shift in railroad remonstrance see Appendix B, Map #3, at v *infra*.)

On January 15, 1958, Mr. H. C. Murphy, President of the Burlington Lines, which consists principally of Chicago, Burlington and Quincy Rr., one of the Appellees here, told Congress that from 1947-1956 his company's gross capital expenditures had reached $327,991,578 and the net cost of additions and betterments after credits for retirements was $226,805,574. Mr. Murphy referred to recent completion in Chicago of a modern classification yard with electronically controlled retarder and other improved yard facilities costing $4 million and a new freight house at Berwyn, Illinois, costing $3 million. *Id.* at 557.

A large percentage of the investment in railroad property has been put on the books since 1946. At year-end 1962 reproduction cost new of "road" and "equipment" property of Class 1 line-haul railways in the United States was $72,900,750,000, and reproduction-cost-new-less-depreciation was $45,349,838,000; original cost

the declining assessments of their property in Illinois 1957-1962 were at full value.[22] The inarticulated premise of the railroads is that the investment in and cost of their property, whether reproduction cost which uniquely re-

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(before depreciation and amortization) of "road" and "equipment" property was $32,862,427,000; the "present value" of "land and rights" was $1,887,046,000; working capital including material and supplies was $517,551,000. ELEMENTS OF VALUE OF PROPERTY USED IN COMMON-CARRIER SERVICE AS OF DECEMBER 31, 1962, CLASS I LINE HAUL RAILWAYS, issued by the Bureau of Accounts of the Interstate Commerce Commission. Peo. Ex. 72, IV Exhibits. The accumulated book depreciation and amortization at year end 1962 for the railroad property covered in the ELEMENTS OF VALUE was $8,552,005,812 of which $7,714,643,798 was for depreciation, producing an original cost less depreciation and amortization of $24,310,421,188. See TRANSPORT STATISTICS IN THE UNITED STATES 1962, 112. TABLE 158 (ICC publication).

The Bureau of the Census reports that the assessed value of locally assessed real property in the United States at year end 1961 was $282,000,000,000 and that the "estimated sales value," i. e., value based on inflated sales prices, was $970,000,000,000. U. S. BUREAU OF CENSUS, II CENSUS OF GOVERNMENTS: 1962, TAXABLE PROPERTY VALUES 25 (v/8). Thus the Bureau of Census estimated that real estate in the United States overall bore a level of assessment of 29%. State assessed rail property in 1961 was $6,427,000,000 according to the Bureau of the Census. *Id.* at Tables 2 and 25. Assume that there is approximately an amount equal to 10% of the state assessed rail property in locally assessed railroad property. The total assessed value of railroad property becomes approximately $7,000,000,000. Non-Class I Line Haul property is offset by railroad property in states where it is not subject to property taxation. There is significant indication that the level of assessment borne by railroad property in the United States in 1961 may reasonably be estimated at 29% if assessed value is related to ICC original cost less depreciation and amortization (7 billion related to 24 billion). See Appendix B at v *infra*. If the assessed value is related to inflated reproduction cost less depreciation, without regard to land and working materials, the level of assessment is 15.5% (7 billion related to 45 billion).

[22] During most of the period directly involved in this case, Illinois' state assessments of railroad property decreased, although the court below labeled them equal to "value." See Appendix E at A-51, Jurisdictional Statement. In only a few states have assessment standards been lowered since 1956. See Map #1, Appendix B at v *infra*. Despite increased investment, increased profits since 1961 and generally the same assessment standards, state assessments of railroad property have been drop-

flects inflation (and deflation), or original cost, which also reflects inflation during times of large capital expenditures, or "prudent investment," is not relevant or entitled to substantial weight in ascertaining the value of railroad property, even though inflated prices are deemed the exclusive determinant of the value of everyone else's property. A state supreme court justice once observed that "practical men" prefer to leave their "major premises inarticulated" but that "even for practical purposes theory generally turns out the most important." *Holmes,*

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ping throughout the United States since the mid and late 1950's. See n. 10 at 12 *supra*. In 1956 state assessments of railroad property subject to local general property taxation were $6,546,000,000 in 36 states. V U. S. BUREAU OF THE CENSUS, CENSUS OF GOVERNMENTS: 1957, TAXABLE PROPERTY VALUES IN THE UNITED STATES, Table 2, p. 23. In 1961 state assessments of railroad property subject to local general property taxation were $5,939,000,000 in the same 36 states. II U. S. BUREAU OF THE CENSUS, CENSUS OF GOVERNMENTS: 1962, TAXABLE PROPERTY VALUES IN THE UNITED STATES, Table 2, p. 29. In 1962, for 35 of the same 36 states, state assessments of railroad property subject to local general property taxation were $5,568,512,000, and the 36th state's figure for 1961 was $138,000,000, producing an apparent $5,706,512,000. PRELIMINARY WORKSHEET TABULATIONS OF THE BUREAU OF THE CENSUS, based upon state-published sources. In 1963, in 35 of the same 35 states, state assessments of railroad property were $5,096,162,000, with the 1962 figure for the 36th state being $215,985,000, producing an apparent $5,312,147,000. *Ibid.* In 1964, 15 out of the same 25 states decreased state railroad assessments. *Ibid.* For example, West Virginia's 1963 state assessment of $322,504,000 was reduced in 1964 to $308,765,000,000. New Jersey's 1963 figure of $151,033,000 was reduced in 1964 to $148,448,000. All this has occurred during a time when the data shows state assessments of non-railroad public utility property moved upward, and property tax collections also moved upward. And between 1961-1962 (and 1963-1964) the annual percentage increase in expenditure for plant and equipment by the railroad industry was higher than for any other industry and about three times the average annual increase for all industries combined. SURVEY OF CURRENT BUSINESS, July 1959, p. 30, Table V-7; September 1961, p. 6, Table 1; March 1965, Table 1, p. 1. We call the Court's attention to the fact that the Bureau of Census has not attempted to measure the relationship between assessment and value of state assessed property. II CENSUS OF GOVERNMENTS: 1962, TAXABLE PROPERTY VALUES 9. See Appendix B at v *infra*.

The Theory of Legal Interpretation, 12 *Harv. L. Rev.* 417, 420 (1899). The railroads' premise is at the heart of the questions presented, and the railroads' Motion begs them. The railroads' premise is here displayed in a constitutional context in which non-railroad property is being valued exclusively by inflated "spot" sales prices, and the issue is one of uniformity and equal treatment.[22a] The railroads have persuaded the supreme court below to discriminate via **valuation** methodology while enforcing an anti-discrimination provision of the state constitution to enforce **equalization.** See n. 10 at 11 *supra.* See Appendix B at v *infra.*

At 11 the railroads state "It is obvious that whatever was happening to the remainder of the economy during this period in the general inflationary process following World War II, the railroads were not participants. Had inflation affected **railroad valuations**, it would have been reflected in the market prices of stock and bonds and capitalized income." First, this case does not involve "railroad valuations," but rather valuations of **railroad property**. Second, inflation, *i. e.*, inflation of the price level, was indeed reflected in the reproduction cost of their property and to a significant extent in the original cost of their property due to huge capital expenditures. Accordingly, lamentations about income and security values appear irrelevant, as they are when industrial taxpayers complain about low profits to the property tax assessor. The railroads' capitalized income and the market prices of their stocks and bonds did, in fact, increase 1946-1957, as did the reproduction cost of their property, yet state assessments of railroad property in Illinois did **not**

[22a] Mr. Justice Brandeis analyzed 363 rate cases decided during 1920, 1921, 1922, 1923 (to March 1) and found the determinations of value based on "spot prices" in only five. Southwestern Bell Tel. Co. v. Missouri Pub. Serv. Com., 262 U. S. 276, 289, 301 n. 14 (1923) (concurring opinion).

increase during that period. See, *e. g.*, Appendix F, G, at A-51, 52 of the Jurisdictional Statement. Moreover, the period since 1961 has been for the railroads one of steadily increasing net income and security prices, reflecting enhancements in value of railroad property which did not occur overnight and were therefore accruing 1946-1961, although not always reflected in earnings and securities data. Furthermore, temporary managerial ineptitude in pricing railroad services, thereby encouraging competition and causing a loss of business to competitors in an expanding market, would not appear to have deflated the value of railroad property. POOLE, COSTS—A TOOL FOR RAILROAD MANAGEMENT (1961) *passim* (Mr. Poole is a retired research expert for Southern Pac. R. R.). Also, capitalized income as an element of value for railroad property has been figured in Illinois after highly questionable deductions for federal income taxes and also for property taxes paid on non-operating property.[23] Finally, capitalized income is designed to measure value by predicting the income flow in the future, and accuracy of this measure is imperfect, particularly when the prediction is based on a period in the past, particularly if the period selected in the past is at low ebb in line with the general economy. Railroads will be producing income with the aid of their

[23] In 1955 Eugene L. Maynard, Director of Revenue's expert in charge of the Property Tax Division, Chicago office, stated: "From the point of view of getting at comparative values of common and utility property, I am inclined to believe that the income approach is suspect, unless it produces value in line with or above a good reproduction cost less depreciation analysis for a going concern . . . . In the case of common or locally assessed property the amount [income] capitalized is always before any allowance for income taxes. If we are attempting to find the value of all of the property owned or used by the utility, how can we disregard that part of the income produced by the property just because the government is going to exact an income tax from the corporation?" CAN THE VALUE OF STATE ASSESSED UTILITY PROPERTY BE COMPARED WITH THE VALUE OF LOCALLY ASSESSED PROPERTY? REVENUE ADMINISTRATION: 1955, p. 32 (published by the National Association of Tax Administrators). People's Second Brief 95-7B. II Ill. Sup. Ct. Rec. 88.

property, apparently in perpetuity. See *C&NW Rr. Co. v. Dept. of Revenue*, 6 Ill. 2d 278, 285-289 (1955) (Schaefer, J.). The facts marshalled by the railroads at their 9-11, even if relevant, are to say the least, misleading.[24]

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[24] At their 9-11 the railroads present only part of the picture in an effort to downgrade the value of their property. (1) They refer to Appendix D at their 47 mentioning 6 railroad transactions purporting to reveal Illinois assessments of railroad property equal to or more than selling price. What the railroads do not say, for example, is that the CB&Q transaction is based upon a formula computation of the "cost of acquisition" of 3% of the Burlington stock in a merger transaction between related companies made by a Burlington officer about two months before he testified, three years after the merger agreements were entered into, which computation, according to the witness, had nothing to do with the merger. The other five transactions, as presented by the railroads, have been shown to be misleading. Brief for Appellee, pp. 62-66, 73-79, People ex rel. Korzen v. CB&Q, 32 Ill. 2d 196, 204 N. E. 2d 760 (1965) (Cook County). Cook County's case was based on on analysis of twelve railroad transactions, 1948-1961, which show that the state assessments of railroad property were substantially less than full value. *Ibid, passim.* The Litchfield and Madison Railroad, a good part of which was in Madison County, and all of which was in Illinois, was acquired in 1957 by C&NW for $8,000,000; the assessment was $4,800,000.

(2) At 10 the railroads assert that their Appendix H at 50-1 "which presents an array of changes in assessments 1935-1960 for all railroads has not been questioned since its submission to the Illinois Supreme Court." The fact is that Appellant discredited Appendix H at 44-5 of their Second Brief in the Supreme Court of Illinois. II Ill. Sup. Ct. Rec. 88. Not the least significant aspect of the vulnerability of the display is the fact that the Appendix purports to reflect only Class I railroads, yet the number of Class I railroads significantly changed several times due to changes in classification standards, constantly increasing the number of railroads in the class.

(3) At 10 the railroads erroneously state that the scale used for Appendices I and J at 52-54 is "the scale in every instance . . . used in People's Exhibit No. 69," which is at 20 of People's first Brief. II Ill. Sup. Ct. 72. People's Exhibit No. 69 uses a vertical axis in units of $100,000,000, i. e., tenths of a billion, whereas railroads' Appendix I uses a vertical axis in units of $10,000,000, i. e., hundredths of a billion. The relatively infinitesimal scale was used by the railroads in their Appendix I in an effort to prove their assertion that the Directors of Revenue did not "hold the line" in railroad property assessment. The effort has been defeated by the numbers. See Appendix E of the Jurisdictional Statement at

VII. APPELLEES' DESCRIPTION OF THE RECORD REFLECTS MISCONCEPTION OF THE FUNCTION AND DUTY OF THIS COURT IN CONSIDERING THE FACTS UNDERLYING CLAIMS OF UNCONSTITUTIONAL ACTION, MISSTATES THE QUESTIONS PRESENTED, EMPHASIZES IRRELEVANCY AND MASSIVELY MISREPRESENTS AN IMPORTANT ASPECT OF STATE ADMINISTRATIVE HISTORY IN ILLINOIS.

The railroads are not content to obscure the small quantity of facts—indisputable ones—which frame the questions presented. See pp. 32-33 *supra* and 48-70 *infra*.

A-51. The scales on People's Ex. 69 and Railroads' Appendix J also differ.

(4) At 10-11 the railroads list some data supposedly showing "that the railroads did not participate in the benefits of inflation during the subject period." Appellant is uncertain that inflation in price levels always produces "benefits." In any event, the data requires amplification. In (a) they recite a decrease in mileage owned of about 3%, 1952-1962, which probably reflects in the main abandonment of unprofitable passenger operations.

In (b) at 10-11 they recite a decrease in freight cars "owned and operated" by Class I line haul railroads. Alfred E. Pearlman, President of the New York Central, one of the Appellees in the case at bar, has explained the misleading nature of such a presentation. The presentation overlooks the increase of average car capacity and increased efficiency in the utilization of cars which, despite a decline of cars "owned or leased" between 1926 and 1964, has produced an increase in revenue-ton-miles of about 48%: 443,700,000,000 in 1926 to 659,327,000,000 in 1964. In 1964 revenue ton miles for the first time exceeded the average annual revenue ton miles for World War II years. HEARINGS BEFORE THE HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, 89TH CONG., 1ST SESS., SER. 89-26, AT 140-152 (1965) ("RAILROAD FREIGHT CAR SHORTAGE"). Mr. Pearlman also told Congress that the New York Central system had expended $531,421,526 for freight equipment since 1956. Moreover, Daniel P. Loomis, President of the American Association of Railroads, has reported to Congress that the type of presentation made by the Appellees to this Court does not reflect the data on "serviceable cars" which have remained constant in number due to the increase in cars repaired and upgraded. Mr. Loomis reported in 1965

At their 2, 4, 7, 8, 9, they urge that the existence of some evidence in the Record supportive of the Supreme Court of Illinois' judgments below preempts plenary consideration by this Court of the constitutional questions.

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that the average capacity of cars placed in service was 77.82 tons while the average capacity of cars retired was 45.44 tons. "The large capital spending program, providing modern switching facilities, improved signaling, better communications, and advanced data processing systems has enabled the industry to secure better car utilization and more efficient transportation. Advanced operating and maintenance methods, such as better journal lubricating devices and hot box detection equipment, are reducing the time cars are out of service for repairs." Letter from Daniel P. Loomis to Oren Harris, June 18, 1965, *Id.*, 165. Further, it is clear that the cost of new cars is inflated, with the result that the investment in cars increased even though additions of new cars owned has been exceeded by old cars retired. HEARINGS BEFORE THE FREIGHT CAR SHORTAGE SUBCOMMITTEE OF THE SENATE COMMITTEE ON COMMERCE, 89TH CONG., 1ST SESS. (1965) *passim*.

In their (3) and (4) at 11 the railroads cite a decrease in passenger miles and equipment which simply reflects a decrease in losses effected by discontinuances urged by railroad leaders since the late 1940's. In any event, there is a dispute within the industry as to what costs should be charged against passenger operations. *Wylie, Railroad Passenger Service Needs Some Positive Thinking, XVII Michigan Business Review* 13 (January, 1965). Moreover, while passenger business is significant for certain carriers in the East, it is a relatively small item for most other railroads. The Eastern railroads in 1961 handled 70% of the total commuter business of the industry. EASTERN RAILROAD PROBLEMS—THEIR SERIOUS SITUATION AND ITS CAUSES. October, 1961 (a pamphlet in Bureau of Railway Economics Library, Rm. 1002, Transportation Building, 17th & H. Streets, Washington, D. C.). The C&NW has had excellent results from its suburban passenger operations. *Schiller, Chicago's Community Railroad Miracle, Harper's,* January, 1966, p. 37. People's Second Brief 62-64, II Ill. Sup. Ct. 88. In 1962 the C&NW's suburban business generated only 12% of its gross revenues. MOODY'S TRANS. MANUAL 1043 (1963). It has no other passenger business.

Appendix C at 5 of Appellees' Motion stops with 1961, but the actual exhibit on which it is based includes preliminary figures for 1962 showing substantial increases in business handled and in profit. Rr. Abst., Vol. II, p. 191. I Ill. Sup. Ct. 17. Mr. Loomis in 1965 confirmed that the 1963-1965 proportionate share of intercity ton miles handled by railroads increased over the proportionate share handled by trucks. HEARINGS BEFORE HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, 89TH CONG., 1ST SESS. 152 (1965) ("National Freight Car Shortage").

Constitutional duty and responsibility traditionally compel attention by this Court to the facts. Perhaps the clearest articulation of this principle has been rendered by Mr. Chief Justice Warren in *Napue v. Illinois*, 360 U. S. 264, 271-2 (1959):

> "The duty of this Court to make its own independent examination of the record when federal constitutional deprivations are alleged is clear, resting, as it does on our solemn responsibility for maintaining the Constitution inviolate. . . . 'In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts but will examine the evidentiary basis on which those conclusions are founded.' It is now so well settled that the Court was able to speak in Kern-Limerick, Inc. v. Scurlock, 347 U. S. 110, 121, of the 'long source of judicial construction which establishes as a principle that the duty rests upon this Court to decide for itself facts or constructions upon which federal constitutional issues rest.' [citing sixteen cases, concluding with a quotation of Mr. Justice Holmes in a seventeenth case decided in 1923.]"

Before 1923 Mr. Justice Holmes had written that "when the decision of the question of fact is so interwoven with the decision of the question of constitutional right that one necessarily involves the other, the Federal Court must examine the facts [citing two cases in which railroads advanced the point]. Otherwise, the right will be a barren one." *Frank v. Mangum*, 237 U. S. 309, 345, 347-8 (1915) (dissenting opinion). In two other cases arising from Illinois, Mr. Justice Stewart has implemented this principle. *Lynumn v. Illinois*, 372 U. S. 528 (1963), *Reck v. Pate*, 367 U. S. 433 (1961). Similarly Mr. Justice Black in *Ashcraft v. Tennessee*, 322 U. S. 143, 147-8 (1944) (this Court not foreclosed "by the finding of a court, or the verdict of a jury, or both"), Mr. Justice Douglas in *Gallegos v. Colorado*, 370 U. S. 49, 52 (1962) ("close

scrutiny of the facts of individual cases''), Mr. Justice Goldberg in *Hayes v. Washington,* 373 U. S. 503, 515-16 (1963) (''independent determination''), and Mr. Justice Jackson in *Stein v. New York,* 346 U. S. 156, 181 (1953) (''. . . else federal law could be frustrated by distorted fact finding'')—all have also announced the principle and implemented it. Moreover, at the instance of railroads, this Court has been moved to announce that ''any pretense or masquerade will be disregarded, and the true purpose . . . ascertained.'' *Smith v. St. Louis & Southwestern Rr.,* 181 U. S. 248-257 (1901). And, ''A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this Court as best it can. Neither the state courts nor the legislatures, by giving the tax a particular name or by use of some form of words, can take away our duty to consider its nature and effect.'' *Galveston, Harrisburg Rr. v. Texas,* 210 U. S. 217, 227 (1908) (Holmes, J.)

In stressing the existence of some evidence in the record to support the judgments appealed, the railroads reflect a misapprehension of the questions presented. Appellant is not seeking to have this Court find the values of the Appellees' properties. Two state courts below have done that already, the trial court and the Supreme Court of Illinois. Rather, the equal protection questions here involve mixed questions of fact and law—going to methodology, i. e., the validity of State action which, in applying uniformity mandates, excludes the influence of inflation and property acquisitions in the valuation of railroad property and simultaneously requires exclusive reliance on inflation in valuing locally assessed property. Similarly, the due process questions do not seek a determination by this Court of values but rather involve standards of proof.

Appellant, in fine, does not ask this Court to consider applying the Fourteenth Amendment so as to direct Illi-

nois how to value property for purposes of property tax uniformity. Appellant asks this Court to consider applying *Cumberland Coal v. Board*, 284 U. S. 23-25, 30-1 (1931) to the facts of this case. *Cumberland Coal* held that the Fourteenth Amendment prohibits arbitrarily and unreasonably disparate valuation methodologies applied to property for purposes of the property tax, and the judgments below are in conflict with it.

In this light, we invite the Court's attention to the verbiage of the Appellees. At 2 the railroads' opening gambit is to characterize the judgments of the Supreme Court of Illinois as ones which ". . . merely adjudicate questions of fact turning upon the analysis and consideration of **voluminous** testimony and exhibits. . . ." Voluminosity is both relative and irrelevant. Moreover, a substantial and detailed record can be helpful in the determination of substantial questions, as has apparently been recognized by some of the Appellees, *viz.*, Chicago & Northwestern Railroad, Gulf, Mobile & Ohio Railroad and Illinois Central Railroad (plus six other railroads) in *C&NW, et al., Appellants v. Atchison, Topeka & Santa Fe Railroad, et al.*, No. 159 on the Appellate Docket of this Court, *prob. juris. noted*, April 4, 1966 (consolidated with *United States et al. v. Atchison, Topeka & Santa Fe Railroad et al.*, No. 576).

The railroads at 9 ask this Court to regard "the presumption of statutory compliance" as sufficient support of the judgments below to warrant dismissal of the appeal or affirmance of the judgments appealed without plenary consideration. Appellant submits that use of a presumption of statutory compliance implies the absence of evidence, which even the railroads argue, with hyperbole, is not a condition of the record at bar. Cf. n. 2 at 2 *supra*. Statutory compliance is irrelevant. Relief for

the railroads does not turn on whether or not the administrator complied with a statutory provision. Indeed, a statutory framework per se could violate federal constitutional mandates, and compliance by the administrator with such statutory commands would not conclude the issue of validity. Here, the railroads' claim is **discrimination.** Suppose, in a full-value state, locally assessed property after state equalization bears a level of assessment of 50% and state-assessed railroad property, 75%. The state administrator has violated two statutory provisions; still, relief would appear indicated on uniformity grounds. Suppose locally assessed property bears a level of assessment after state equalization of 100% and state-assessed railroad property, 125%. Here, the administrator has violated the statute in assessing railroad property; still, relief would be indicated on uniformity grounds. Finally, locally assessed at 125% and railroad property at 150% would also warrant relief. The foundation of relief is not statute; it is constitution. The pertinent presumption, if any is needed, has been announced by this Court: "The **good faith** of such officers [state tax administrators] and the **validity** of their **actions** are presumed; when assailed the burden of proof is upon the complaining party. . . ." *Sunday Lake Iron Co. v. Township of Wakefield,* 247 U. S. 350, 353 (1917). This presumption of "validity" includes compliance with constitutional duty and militates for reversal of the supreme court judgments below and reinstatement of the trial court's judgments.

Irrelevant preoccupation by the railroads in their Motion with alleged statutory compliance has moved the railroads to state at 9: "We further respectfully suggest that the record contains a great deal of creditable [sic] evidence directly and overwhelmingly establishing that the Department performed its function **in good faith and assessed the railroads' properties at their full fair cash**

valuations." Appellant denies that under the circumstances of this litigation assessment of railroad property at full value would constitute evidence of the Directors' good faith, assuming that "good faith" is relevant. Logically, if the Directors of Revenue acted in good faith, the railroads should be entitled to no recovery or at least mitigated recovery. The Supreme Court of Illinois has found that the Directors assessed railroad property at full value. The railroads contend this finding is evidence of good faith. Accordingly, the railroads should be entitled to no relief or at least less relief. Yet the railroads were granted by the supreme court below twice the relief that the trial court granted. In truth, **relief for the railroads is allied with railroad-alleged bad faith** on the part of the Directors, and the supreme court below found the Directors of Revenue twice as derelict as the trial court did and consistently awarded twice the amount of refunds. No verbiage can obscure the conclusion that in view of the Directors' equalizations of locally assessed property at less than full value, assessment of railroad property at full value would constitute evidence of **bad faith**. In truth, by arguing the converse of the obvious, the railroads give emphasis to a *reductio ad absurdum* produced by analysis which contemplates unrealistic segregation of two statutory duties of the same official, the Director of Revenue, (equalization at full value of locally assessed property and assessment of railroad property at full value), followed by application of detached, compartmentalized presumptions of statutory compliance. It is unrealistic to suggest that the administrative tax chief, the Director of Revenue, equalized locally assessed property and assessed railroad property without at the same time relating his actions between the two categories of property. It is also unrealistic to believe that the Director's policy in assessing railroad property (3-4% of the tax base) would have controlled his policy in equalizing lo-

cally assessed property (96-7% of the tax base). It is sensible to believe that his policy in equalizing locally assessed property controlled his policy in assessing railroad property. The data confirm the sensible. But see n. 2 at 2 *supra*.

At 11 Appellees state that with regard to railroad property "Cost Was Never Accepted as Reliable." We ask the Court to note that this language does not distinguish between original cost, reproduction cost or "prudent investment." Further, the supreme court below never explicitly rejected reproduction cost—only that influence of reproduction cost in valuation which reflected inflation and property acquisitions. See Jurisdictional Statement A. 10-12. The record is clear that the administrative process never rejected giving reproduction-cost-less-depreciation-and-obsolescence one-third weight in the formulaic average of the elements of value. The railroads' presentation at 11-15 in describing the use of reproduction cost by the administrative process in Illinois is rife with quotation out of context and represents a rewriting of history which, in attempting to bury cost of and investment in their property for purposes of property tax valuation, grossly belies the record. The record contains oral testimony and documentary reports about the administrative process confirming use of reproduction cost for decades. Appellant is constrained to pinpoint the intensely misleading nature of the railroads' unbalanced use of quotation interwoven with their textual offerings.[25]

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[25] The railroads have offered to this Court a presentation which repeatedly quotes administrative Reports out of context. A fair reading of the Tax Commission Reports reveals acknowledged defects in all the elements of value, not just in reproduction cost. For example, at 12 the railroads quote at length from their Abstract of the record to show that in 1933, the year when Illinois first employed economists who commenced rationalization of the property tax system, the Tax Commission "looked askance at reproduction cost as a reliable indicator of railroad

VIII. THE RECORD PROVES UNDENIABLY THAT THE DIRECTORS OF REVENUE OF ILLINOIS UTILIZED "JUDGMENT FACTORS" TO ELIMINATE THE INFLUENCE OF PRICE INCREASES ON PROPERTY VALUES BOTH IN EQUALIZING LOCALLY ASSESSED PROPERTY AND IN ASSESSING RAILROAD PROPERTY 1949-1962.

A. The Directors Ignored Inflation in Their Equalization of Locally Assessed Property 1949-1962.

At 6 the railroads misstate the Director's statutory "authority and responsibility" to increase local, *i.e.*,

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value while recognizing its usefulness in the allocation factor." Earlier on the same page of the Report (Peo. Ex. 34, p. 187, I Exhibits), which contains the first paragraph quoted in n. 6 at 12 of the Motion, is to be found this language:

> "These three methods of valuation ['appraisal of physical properties' based on either original or reproduction cost, capitalized earnings, and value of stock and lands] condition and limit each other so that a fourth method, which is a composite of the above or a weighing of the various factors previously enumerated, ought to be identified. The composite method rests upon the theory that true values can only be determined by a consideration of all of the elements above enumerated."

All the extant administrative data sheets prior to 1963 indeed evidence that reproduction-cost-less-depreciation-and-obsolescence was averaged with the other two elements of value.

In their n. 6 at 12, the railroads show three ellipsis marks at the end of the first paragraph instead of four and create the impression that the following two paragraphs are in the same context and same section. In fact, the first two quoted sentences are at the end of a section in the 1933 Report entitled "Determination of System Values," and the quoted text following the ellipsis marks is taken by the railroads from material five pages later in a section entitled "Allocation of Unit Values." The same misleading format characterizes Vol. II of the Railroads' Abstract at 281-82. Also, at 13, n. 7, the railroads use a quotation from the 1937-1938 Report which states that certain elements of value, not including "cost," caused a drop in assessments. The railroads imply the *non sequitur* that "cost" was not an element of value. The data indicates that the Tax Commission between 1933

county-wide assessments, to full value, reciting, "if local assessing officials fail to assess at full fair cash value, the Department of Revenue is **empowered** to certify to the county clerk an appropriate multiplier to raise the level

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and 1939 had been decreasing assessments, moving in the direction of giving cost less weight but no less than one-third weight in the valuation formula. See the statement of Raymond S. Danis in 1960 in n. 17 at 21-22 *supra*. At 13 the railroads state that the statute after 1937 did not require the use of reproduction cost in valuation. The fact is true but irrelevant. The fact is true also that the administrators did use it pursuant to their discretionary authority. See n. 31 at 59 *infra*.

The railroads state at 13 that the statute requires the use of reproduction cost "as a component of the formula by which the allocation factor is determined for the apportionment of income and stock and debt values." In fact, the allocation statute, quoted at 42 of the Motion, does not require the use of reproduction cost, providing discretion for substituting other factors. Contrary to the statements of the railroads at their 13, 17, the statute does not say that allocation formula shall be used to allocate only system income and security value but rather the "value of the entire operating property of such railroad."

Again the railroad is highly selective in quoting from the thorough discussion of railroad property assessment practices spread over fifty-three pages in the **1939-1940** Tax Commission Report (written by George W. Mitchell) (Peo. Ex. 38, I Exhibits). In the process the railroads distort meaning in the manner that the railroads' Abstract in multitudinous instances distorts the record. Quoting at 14 of their Motion from page 60 of the Report that there was contraction in the physical plant and falling off of earning capacity during the period 1920-1940, the railroads preceded the partial quote with reference to the impact of competition from other forms of transportation creating an undiluted cause and effect relationship. The railroads omitted the statement eight lines earlier at 60 of the Report that "severe depression" was also a causative factor. Also omitted by the railroads is the Report's statement 15-22 lines earlier that the railroads' rate structure had developed on the basis of what the traffic would bear, with little or no relationship to cost of service and thereby had "facilitated the development of other branches of the transportation industry." At 14-15 of their Motion the railroads quote misleadingly from 91-92 of the same Tax Commission Report, creating the impression that there was no valuation formula for railroad property in Illinois, suggesting that the Tax Commission's approach was essentially the same as Justice Butler's verbalization in a 1934 case decided by this Court, quoted by the railroads, namely, there is no rational approach to value, just unarticulated judgment which, if true, would pre-

of assessment of locally assessed property to 100% of value." In fact, the statute after, but not before, January 1, 1946, **required** the Director to do this. Jurisdictional Statement A46-47. Persisting in their inaccuracy,

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clude all judicial review of administrative property tax valuation. In the first place, the 1934 case was Rowley v. C&NW, 293 U. S. 102 (1934), and Justice Butler's opinion at 105-07 reveals heavy reliance on reproduction cost by the Wyoming administrative process. Second, the pertinent section at 91-99 of the 1939-40 Report is headed "Valuation," and the sub-headings are "Earnings" at 92, "Stock and Bond Value" at 96 and "Cost of Reproduction" at 98. The Report states at 98: "The Commission has considered, along with net earnings and stock and bond value, the cost of reproducing the property as a factor influencing its judgment as to the fair cash value . . ." At 99, "It [the Commission] has confined its consideration to reproduction cost of the current inventory of the property and for this purpose uses the inventory and price indices of the Interstate Commerce Commission. From the estimated cost of reproduction new is deducted an amount which represents accrued depreciation and, to some extent, obsolescence so that the result is an estimate of cost of reproduction of the existing plant in its present condition . . . . **There still remains a large gap between the cost of reproduction and the value indicated by earnings and the stock and bond method for a large proportion of the carriers, but disadvantages encountered in the case of other factors are to some extent compensated by the use of this factor . . . the Commission has utilized reproduction cost of the system and allocated it to this state in the same manner as the earnings and stock and bond values.**" See n. 32 at 60 *infra*. Peo. Ex. 38, I Exhibits.

Moreover, the railroads overlook the fact that the Tax Commission Report for **1941** and **1942** states at 3: "It should be emphasized in the first place that other factors than income are taken into account in arriving at railroad assessments; stock and debt valuations, as reflected in market quotations, and I. C. C. reproduction cost figures both are factors of great significance in reaching conclusions respecting the full, fair cash value of railroad property." Peo. Ex. 39; I Exhibits. In June 1947 the PRELIMINARY REPORT OF THE COMMITTEE ON RAILROAD ALLOCATION OF THE NATIONAL ASSOCIATION OF TAX ADMINISTRATORS, at Appendix B-6, stated: "Cost, in one or another of its aspects is a factor that properly deserves recognition in ascertainment of unit value." The Committee was composed of state administrators from twenty states, including Lynn A. Stiles of the Illinois Department of Revenue and former Illinois Tax Commissioner, George W. Mitchell, then a tax economist with the Federal Reserve Bank of Chicago.

In May 1949 the Revenue Laws Commission of the State of Illinois transmitted to the Governor a Research Report which

the railroads state at 16, ". . . there was nothing arbitrary in the giving [by whom, court or Director of Revenue?] of effect to the higher values measured by sales prices in the equalization process, as the statute **required,** in determining the county wide level of assessment."[26] The statute does **not** require that the Director's determination of the full value of locally assessed property for equalization purposes be based exclusively on current sales prices of real estate reflected in the studies of property transfers. The statute provides that the Director shall determine "estimated full, fair cash values established through the analysis of property transfers, property appraisals **and such other means as it [Department of Revenue] deems proper and reasonable** . . . " Jurisdictional Statement A-46.[27] Furthermore, Appellant has never stated

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had been prepared by its Technical Staff. At 41 this report stated: "The intangibles of the railroads are included, at least indirectly, however, in the valuation of the entire system. In the case of interstate carriers, a proper valuation of the total system valuation is assigned to Illinois. The system valuation of a railroad is based on earnings, market quotations on securities outstanding and reproduction cost."

The Supreme Court of Illinois, per Justice Schaefer, stated in 1955: "In arriving at its final assessment, the Department averages these three factors in the case of the plaintiff's property and the property of forty-five other railroad companies. This method was pursued prior to the enactment of the Revenue Act of 1939 and in each year thereafter." 6 Ill. 2d 278, 282.

[26] The railroads argue at their 16: "But, it does not follow that all other properties which sold were thus increased in value," in an effort to debunk the reflection of inflation in assessment-sales ratio studies. The observation of the railroads may be true but it is irrelevant. The ratio studies generally reflected the inflation in full force. See n. *27 infra.* That fact is precisely why the railroads argued to the Illinois Judiciary that they should be used as the sole determinant of value of locally assessed property. The Supreme Court of Illinois was persuaded by the argument.

[27] An assessment-sales ratio study involves an annual study relating (sometimes on a sampling basis, sometimes on a total basis) sales prices, for the year or shorter period under study, of real estate, mostly residential, agreed upon between buyers and

that to impute the value of locally assessed property exclusively from current assessment-sales ratios reflecting current prices is arbitrary. Appellant does contend that not to reflect, at least to some substantial extent, price increases in the valuation of railroad property at the same time is arbitrary and discriminatory. In stating at 15 that, "these official ratio studies reflected the level of assessments and equalized assessment of a given county [sic] for the year surveyed," the railroads are asserting an opinion which no Director of Revenue or staff aid has ever GIVEN in Court.[28] This quoted statement

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sellers in arms length transactions, with corresponding equalized assessments of the traded properties. The relationship of assessment and price for all measurable or sampled transactions in the jurisdiction studied are statistically combined and appropriately weighted to produce a ratio for each county and for the entire state. Assessment-sales data permit nothing more than the derivation of ratios. These ratios do not produce the "level of assessment" unless it is decided that current prices are to be the sole determinant of value. (The relation of two numbers known as the "level of assessment" connotes a knowledge of two facts: assessment and value.) Once the decision is made to base value solely on current prices, the ratio automatically provides the level of assessment, and the value of locally assessed property is automatically imputable from the ratio. Thus, if the locally assessed property assessment-sales studies produce a ratio of equalized assessment to price of 50%, and the sales prices alone are to determine value, then one need only double the equalized assessments in the county or state in question to arrive at full value. In the example, if equalized assessments of local property total $1,000,000, then the value of that property is $2,000,000 because assessments are 50% of sales prices.

[28] The railroads sponsored Eugene L. Maynard and Allan E. Garber, highly qualified administrators on the staff of the Directors of Revenue, who were asked by the railroads to describe the methodology of the assessment-sales ratio studies conducted under their supervision and to identify the ratios derived by them from the studies for Madison County for the period 1953-1962. They were not asked to express an opinion on the value of locally assessed property or railroad property. R. 332-352. I Testimony. On cross-examination Appellant established that the staff had developed assessment-sales ratios for locally assessed property in each county and then presented them to the Director who used his "judgment" and "determined" "equalization factors"

from Appellees' Motion assumes the answer to the important question of how to value locally assessed property for property tax purposes, and in Illinois the question was not answered in court until 1961 by the Supreme Court of Illinois in *Hillison* and *Kohorst* and then in a vein fundamentally different from what the Directors' answer had been since the late 1940's.

The Record makes clear, as the railroads proved and argued to the trial court, that the Directors of Revenue never estimated full value of locally assessed property by exclusive reliance on their staff's current assessment sales ratios derived from studies in the field.[29] If the railroads at 15

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to produce the county multipliers. R. 279-80, 284, 326, I Testimony. Mr. Garber testified that he did not know whether the Director considered the price level in determining the "equalization factors." The "equalization factors" actually determined by the Directors discounted inflated prices and were **not** based on the assessment-sales ratios. The "equalization factors" were higher than the assessment-sales ratios and therefore produced smaller multipliers which, when certified to Madison County, did not raise local assessments to the value imputable from the assessment-sales ratios. See pp. 55-58 *infra;* Rr. Ex. 15 at 4 of II Abstract. I Ill. Sup. Ct. Rec. 17.

[29] From 1946-1959, the statute did not mention "equalization factor," a term developed prior to 1946 when the Director of Revenue and the Tax Commission did not have the duty to equalize at full value. The statute, 1946-1959, required the Director to ascertain "the amount to be added to or deducted from the aggregate reviewed assessment on property subject to local assessment jurisdiction in order to produce a ratio of assessed to full, fair cash value equivalent to one hundred percent." People's Jurisdictional Statement A-47. The statute also provided that the Director should determine the "percentage relationship" between assessments and full value, "and certify to the several county clerks the percentage finally determined by it **to be added to or deducted** from the listed or assessed valuation." Appellees' Motion at 44. The statute appears to have contemplated certification to the counties of amounts of dollars needed to raise or reduce local assessments to full value. Instead, a given multiplier was certified to each county and then applied to each local assessment in the respective counties. Not until 1959, when the legislature froze "equalization factors" for four years, did it, of necessity, mention the "equalization factors." The re-

mean to state otherwise in writing, "The Department performed its equalization functions upon the facts disclosed by sales-assessment ratio studies," they misrepresent the Record. The railroads built the Record on equalization by the Directors of Revenue of locally assessed property. The record proves that the following published description of a disinterested scholar is correct:

> "It is significant that the department does not use the term 'assessment ratio' in its reports on inter-county equalization. Instead, the figures from which the percentages for the counties are computed are called 'equalization factors.' The equalization factor does not represent a true assessment ratio derived from a purely statistical analysis of the sales data. The equalization factor is computed through a formula which combines the use of sales data, appraisals and 'deflationary factors' which are designed to alter the results of objective market information on sales according to the judgment of the department as to what constitutes a 'correct' or 'actual' or 'reasonable' value. The department has not relied solely on sales data, sup-

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lationship between the "equalization factor" and the multiplier certified is crucial. The state-designated multiplier applied to local assessments was the "reciprocal" of the "equalization factor," a percentage relationship determined by the Director between local assessments and his determination of locally assessed property values for each county. The mathematical definition of a reciprocal of a number, not a percentage, is the quotient of 1 divided by the number. That is, the reciprocal of 2 is ½. The reciprocal of ½ or .50 or 50% is 2. The Director's "equalization factors" represented percentages equivalent to numbers, the reciprocals of which constituted the multipliers certified to the counties. If an equalization factor determined by the Director for a county was 100, the percentage was 100%, the number was 1 and the number's reciprocal was 1 and 1 was certified to "equalize" the local tax base. In Madison County the Director's equalization factor, 1958-62, was 100%, and the multiplier certified was 1. Yet the judiciary found the level of assessment of locally assessed property in Madison County at about 50%. See Rr. Ex. 15, II Abstract. I Ill. Sup. Ct. Rec. 17. The higher the equalization factor, the lower the multiplier.

> plemented by appraisals, during the time the Full-Value Assessment Program has been in force. They have not permitted the market data to 'speak for itself' so to say, but rather have 'adjusted' the results to suit their judgments as to 'real' values. Until 1948, the department published detailed yearly property tax statistics in which the actual assessment ratios were given along with a considerable amount of statistical analysis. However, no complete statistical analysis of the departments methods of computing its equalization factors has been made outside the department." Pealy, "A Comparative Study of Property Tax Administration in Illinois and Michigan," 99 (1956) (Bureau of Government, Institute of Public Administration, University of Michigan).

A clear description of how the Directors discounted current prices reflected in the sales studies in formulating "equalization factors" is contained in the Illinois Legislative Council Report of 1957. "Equalization of Property Tax Assessments" Peo. Ex. 1a, pp. 4-8. I Exhibits.

How did the Director derive the "equalization factors?" They are numbers expressing a percentage relationship between the local assessments and the full value of locally assessed property as determined by the Director for purposes of discharging his equalization duties. See Rr. Witness Weil at I Testimony 485. That is, if the assessments were 100 and the Director concluded that the value of the property was 100, the equalization factor would be 100; but if he found the value to be 200, his equalization factor would be 50. An equalization factor of 50 means that the Director determined the local assessments in a county were 50% of value. In short, the equalization factor was the Director's determination of the level of assessment of locally assessed property before the application of state-certified equalizing multipliers.

The record indicates that, except for the exceptional county where local assessors increased assessments closer to value, the Directors never significantly increased the equalization factors, implying that in their "judgment" value was not going up unless local assessors said so. For example, the multipliers certified to Cook County have not changed past the hundredth of a number since the late 1940's. (1.4) The record proves then that except for infrequent changes in local assessment policy, the Directors did not change the equalization factors significantly and, like most local assessors, ignored inflation. The multipliers, like local assessments, remained static.

What then was the relationship between the county ratios developed by the Director's staff in its sales studies and the Director's equalization factors? The Director simply was not controlled by these sales ratios in formulating his equalization factors. Assume a ratio, based on current sales prices, was 50%. Considered alone, it would compel a multiplier of 2 in order to raise local assessments of property to 100% of full value, assuming current price determines value. For Madison County in 1958, the staff's sales ratio was 51.49 but the Director's equalization factor was 100, producing a multiplier of 1. See Rr. Ex. 15, II Abstract 4, I Ill. Sup. Ct. Rec. 18. Clearly, the Director did not determine levels of assessment for locally assessed property based on ratios of assessments to value imputed from current prices.

The Director used "judgment" in deriving multipliers.

1. Railroad witness, Professor Rolf Weil, at R. 468-471: (I Testimony)

> The ratio of assessment to selling price developed by the staff in its studies for each county was "taken into the Director's office, and out of the director's office comes something called the equalization factor.

What happens between the time it goes into the director's office and the time it comes out of the director's office is something which has never been written up, something which no one I suppose could exactly testify to except the various directors of revenue over the years. . . . There is a gap there. There is a jump that is made from the statistical data and the equalization factor . . . the director uses discretionary . . . authority. He uses judgment factors. It has been given names. Occasionally he has called it a judgment factor . . . they have called it all sorts of things. Inflation adjustment factor . . . [the multiplier] is usually less than it would have been on the basis of the ratio studies . . . .'' (Weil stated that one of the arguments for interposition of judgment in the process which led from the sales ratios prepared by the staff to the equalization factor was a distrust of market value in time of inflation, and he condemned the argument as anathema to every economist he knew.)

2. Professor Weil in his 1953 article, People's Ex. 57, excerpted in Appellant's Additional Abstract at 57-66, II Ill. Sup. Ct. 71, and in full in I Exhibits:

''There are two major reasons why the county assessment ratio, based on real estate sales during the latest assessment year, has not been employed as the equalization factor. . . . The second and in the opinion of the writer, unjustifiable reason has been the distrust of market value in time of inflation . . . policymakers have a tendency to take it upon themselves to temper the objective judgment of the market with their own subjective judgment. This can be accomplished by various averaging formulas, involving the county ratios for several years, and by the use of 'deflationary factors'. . . . During the short history of full value equalization in Illinois,

> a number of formulas have been used to determine equalization factors. . . . The Department stated in 1948 that 'the equalization factors announced for 1947 and the corresponding multipliers tend to discount today's inflated purchase prices . . .'' (pp. 160) ''. . . once the average assessment ratio is found [from the staff studies] it should be the equalization factor . . .'' (Peo. Ex. 57 at 157); see Stiles' 1949 memorandum on railroad property assessments. Peo. Ex. 112, in Appellant's Add. Abst. 86-7, II Ill. Sup. Ct. 71.

If determination of value of locally assessed property must be based on current sales prices, then the Directors of Revenue certified deflationary multipliers to the counties. Thus, on this hypothesis, as prices and values rose, the level of assessment of locally assessed property decreased because the equalized assessments on particular properties were not increased. I Testimony 478-482. The Directors of Revenue, deferring to local assessment policy, ignored price level influences, until the legislature in 1959 enacted a statutory requirement that existing ''equalization factors'' be frozen for four years.[30]

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[30] See n. 29 at 53 *supra*. For a description of state tax administrative failure to equalize local assessments at full value in Kentucky see Russman, et al. v. Luckett, et al., 391 S. W. 2d 694 (1965) (Court of Appeals). Railroad witness Rolf Weil's article, "Property Tax Equalization in Illinois," National Tax Journal 157 (June, 1953), which is in evidence, contended that from 1946-1950, based upon inflating prices, the full valuation of Illinois property increased from $22.9 billion to $35.7 billion, whereas the assessed values after application of the Director's multipliers increased from 20.8 billion in 1946 to 21.0 billion in 1947 to 22.4 billion in 1948 to 22.7 billion in 1949 to 23.1 billion in 1950. At 165 Weil presented a study revealing that if in 1950 the Director of Revenue had increased local assessments in the City of Chicago to full value, state aid to the Chicago's school districts would have been zero rather than the 6.7 million actually received, on the assumption that the legislature did not change the "qualifying rate." Peo. Ex. 57, I Exhibits.

B. The Directors Ignored Price Level Increases and Property Acquisitions in Assessing Railroad Property 1949-1962 Because They Were Also Ignoring Price Increases in Equalizing Locally Assessed Property.

The traditional Illinois formula used in "unit valuation"[31] of railroad property for property tax purposes averages three factors: capitalized earnings, market value of stock and debts, and reproduction cost-less-deprecia-

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[31] "The tax laws of Connecticut, Delaware, Maine, Minnesota, New York, Pennsylvania, and Rhode Island are inappropriate to application of the unit rule, while in practice this method is little employed in Massachusetts, New Hampshire, New Jersey, Texas, Vermont and Virginia." Preliminary Report of the Committee on Railroad Allocations 1 (1947) (National Association of Tax Administrators.) See Map #1, Appendix B at v *infra*. The "unit" method of valuing railroad property for property tax purposes, *i.e.*, valuing the multi-state railroad as a unit prior to allocation by the respective state tax administrators, has involved the use of capitalized earnings and market value of securities as measures of value in addition to cost of the railroad's property. Two principal reasons for the development of the unit system of valuation were to enable state authorities to tax movable property of railroad corporations doing business in a number of states and also to tax the value of intangible property in excess of the value of the "bare bones." The unit rule was not intended to eliminate the influence of cost of or investment in property as a measure of value. In Illinois the legislature in 1937 mandated consideration of the earnings and securities measures of value, but it did not mandate elimination of the influence of the cost of railroad property as a measure of value. The constitutionality of the 1937 legislation has never been tested. Elimination of the influence of inflation and property acquisition via the cost factor was mandated by the Supreme Court of Illinois in the judgments now challenged in this Court by Appellant, culminating five prior decisions, 1961-1965. Dogged refusal in 1958 of Raymond S. Danis to state that the purpose of the administrative "judgment factor" was to eliminate the influence of reproduction cost is at People's Second Brief in the Supreme Court of Illinois at 89-90. II Ill. Sup. Ct. Rec. 88.

Unit valuation requires allocation of system figures. A National Association of Tax Administrators committee in 1947 promulgated an allocation formula which would give proper weight to "terminal state" allocation as distinguished from "bridge

tion-and-obsolescence. "This method was pursued prior to the enactment of the Revenue Act of 1939 and in each year thereafter." *C&NW v. Dept. of Revenue*, 6 Ill. 2d 278, 282 (1955) (Schaefer, J.). The only one of these three factors which could reflect increases in the price level as rigorously as do assessment-sales ratio studies is reproduction cost **based on "spot" prices. ICC reproduction cost**, utilized in Illinois, is based upon **"period"** price multipliers applied by the ICC's staff to the up-to-date inventory records of the carriers. These price indexes, based on period prices, not spot prices, are in the record for 1914-1962 as Peo. Ex. 370, III Exhibits. There are separate index numbers for each road account and each equipment account. The application of these inflating indexes based on "period" prices caused ICC reproduction cost to shoot upwards 1946-1960. See Appendix B at v *infra*. Appellees' Motion at 16-17 reflects misapprehension about the derivation of reproduction cost in Illinois despite the record.[32]

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state" allocation. Illinois is a "terminal state," but has never adopted the NATA formula. Appellant's Second Brief in the court below. II Ill. Sup. Ct. Rec. 88 at 168-69B.

[32] See n. 25 at 42 *supra*. The railroads' motion reflects misconception of the method by which the reproduction cost figure in the Illinois valuation formula has been derived. Generally, this cost figure is derived by allocating for Illinois a percentage of the ICC figures. See the Tax Commission Statement at n. 25 at 50 *infra*. The property tax returns filed by the CB&Q and the C&NW, which are in the Record for 1957-1962, are confirmatory. The allocation factor applied to system reproduction cost is different from the average of a multi-unit allocation factor developed for the purpose of allocating to Illinois portions of system capitalized income and system market value of securities. Reproduction cost data has been kept by the ICC staff for "Road" and "Equipment" property. It is clear that the reproduction cost of equipment, of necessity, is not allocated on the basis of situs as otherwise indicated by the railroads at 6, 17. Moreover, the record does not support the statement that the reproduction cost of "Road" property in Illinois was determined on a "situs" basis; rather, it appears that such data has been allocated for Illinois from system reproduction cost for

That price level increases inflated the formulaic averages markedly after 1946 is incontrovertible. Net property additions had the same effect. During a substantial part of the period 1946-1962 all three formulaic factors increased; during the last six years of the period, cost leveled off and the other two factors decreased. The assessments never changed to reflect the price level increases and property acquisitions. The technique for accomplishing the result was the "judgment factor." Appendices E, F, A 51-2, Jurisdictional Statement.

Obscuring the elimination of price level increases in equalizing locally assessed property, the Directors and their aids saw themselves unable to admit the purpose of the judgment factor reductions in railroad property assessments. The staff man "in charge" of railroad assessments, 1949-1960, Raymond S. Danis, pressed by the railroads, rationalized the "judgment factor" as an element of value; the rationalizations are demolished by the data. People's Second Brief 80-92, II Ill. Sup. Ct. Rec. 88. At 17 the railroads state that "Koncel . . . testified unequivocally that the railroad assessments were at full fair cash value." But Koncel, who joined the staff in 1960,

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"Road" property. The Record proves that Illinois' "Supervisor of Railroad Assessments" had an exceeding small staff, which could hardly have dealt with the physical properties of the sixty railroads if they were to have been ascertained on a situs basis. Appellees' statement at 17 that "Economic obsolescence is not adjusted out of the reproduction cost factor before its use in the formula" is inaccurate. The record is clear that pre-formulaic reductions were made by the Director's staff to the ICC cost figure for "uneconomic property," commencing in 1952, and in some cases for "obsolescence", commencing in 1957. The inaccuracy of the railroads' presentation is increased by its assertion at 16-17 that "unit" valuation in Illinois includes "funds involved in operations and all other operating personal property." The record is clear that the Director did not include working capital and materials and supplies. See Ill. Rev. Stat. c. 120, §§ 561, 560 (2); City of Alton v. Ill. C. C., 165 N. E. 2d 513, 518-19 (1961); 304 S. W. 2d 297, 300 (1957) (Ark.).

did not determine the assessments in 1961 and 1962; he performed the arithmetic. The assessments were determined by one of his chiefs, the Deputy Director of Revenue, a non-lawyer and former nationwide tax representative of Sears-Roebuck & Co., who later as a Director of Revenue, candidly testified for Appellant:

> "As I said before, for 1961 and 1962, we determined what we thought, in order **to hold the line**, a full, an **assessed** value for all railroads in the State of Illinois . . . in 1961 . . . **the judgment factor was varied in the railroads so as to arrive at a billion thirty two million. In 1962 we determined the overall value to be 990 some million, and again we varied the judgment factor for the railroads to arrive at 990 some million** . . . . Well, that was the easiest way out . . . . Keep it about the same as it was the year before . . . my thoughts had nothing to do with how much the railroads were earning or what their earnings should be, could be . . . **Mr. Dobbs, I am sorry. If I am going to be truthful, it was an arbitrary decision [to reduce industry assessment 4%].**" Appellees' First Brief 62-64, II Ill. Sup. Ct. Rec. 72; II Test. 1072-73, 1086, 1090, 1091, 1095, 1100-01, 1104; People's Second Brief 57 n. 16, II Ill. Sup. Ct. Rec. 88.

Mr. Koncel was asked by Appellant's counsel, "Now **was your approach** to the valuation procedure—strike that—was your approach to the valuation procedure in 1961 and '62 **essentially the same as Mr. Danis's**?" To which, Mr. Koncel answered, "**That's right.**" R. 2549. IV Testimony.

The ineluctable numbers figured by Mr. Danis and Mr. Koncel establish that the effect of the judgment factor reductions was to eliminate the influence of inflation and property acquisitions in the assessment of railroad property, 1949-1962.

IX. IN DETERMINING PROPERTY VALUES FOR CONSTITUTIONAL PURPOSES 1961-1965, THE SUPREME COURT OF ILLINOIS REJECTED ADMINISTRATIVE "JUDGMENT FACTORS" ELIMINATING INFLATION IN STATE EQUALIZATION OF LOCALLY ASSESSED PROPERTY AND SIMULTANEOUSLY EMPLOYED ADMINISTRATIVE "JUDGMENT FACTORS" ELIMINATING INFLATION AND PROPERTY ACQUISITIONS IN STATE ASSESSMENT OF RAILROAD PROPERTY.

"The court did not mandate the following of inflationary trends." (A one sentence paragraph at 15 of Appellees' Motion.)

The two paragraphs immediately following this statement at Appellees' 15-16 suggest that the sentence is referring to valuation of locally assessed property. If the suggestion is accurate, the sentence is a canard. If, however, the sentence refers to railroad property valuation, it is a half-truth because the court below did much more than that; it mandated that reliance on inflation in railroad property valuation is prohibited by the state constitution. See pp. 67-68, *supra.*

Prior to the decision of the trial court in August 1964, on full records pertinent to the issue the Supreme Court of Illinois had rejected the multipliers certified by the Director of Revenue and mandated that the value of locally assessed property must be based exclusively on the valuation to be imputed from the county-wide ratios developed by the Director's staff from the assessment-sales ratio studies. On March 29, 1961, the supreme court below first found the Directors' equalizations "arbitrary," having failed to increase local assessments to full value. *People ex rel. Hillison v. CB&Q,* 22 Ill. 2d 88, 96-98, 100-01 (1961); *People ex rel. Kohorst v. GM&O and C&NW,* 22 Ill. 2d 104, 109-12 (1961). The

court below held in those two cases that the valuation of locally assessed property must be imputed from the county-wide ratios developed from the staff studies of the Department of Revenue, and that the equalized level of assessment therefore was not greater than 50-55%.[33] Next, on May 27, 1963, the court below rejected criticisms of the assessment-sales ratio studies of the Directors' staff as a reliable determinant of value and gave a detailed description of the methodology. *People ex rel. Wenzel v. C&NW*, 28 Ill. 2d 205 (1963). On November 26, 1963, the court again required that valuation of locally assessed property be determined by imputation from the Director's staff's sales ratio and therefore found the equalized level of assessment at not greater than 55%. *People ex rel. Enrietta v. GM&O*, 29 Ill. 2d 605, 609-611 (1963). These four cases set the stage for the trial of the case at bar.

In light of the prior four cases and the soundness of the economic theory underlying the four prior decisions anent valuation of locally assessed property, the trial court below found value of locally assessed property by imputing it from the Director's staff's assessment-sales county-wide ratios which the railroads sponsored, and found levels of assessment accordingly. See Jurisdictional Statement A. 24-26. Appellant did not appeal this finding because Appellant believes it is correct.

In *Hillison, Kohorst, Wenzel* and *Enrietta,* the supreme court below confronted records which did not explain the Director's methods of equalizing locally assessed prop-

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[33] In *Hillison* the court below at 97 referred to "the U. S. Census Bureau study of the proportion of Illinois assessed values, as equalized, to full, fair cash values, ascertained through sales prices during the first six months of 1956." The Bureau's studies impute value of locally assessed property by relating 1956 "spot" prices of real estate to corresponding assessments. U. S. BUREAU OF THE CENSUS, V CENSUS OF GOVERNMENTS: 1957, TAXABLE PROPERTY VALUES 1; II CENSUS OF GOVERNMENTS: 1962, TAXABLE PROPERTY VALUES 1. Peo. Ex. 58, I Ill. Sup. Ct. Rec.

erty nor did the records explain that in equalizations of locally assessed property the Directors were ignoring inflation. The prior decisions never mentioned "price" and no Director of Revenue had testified. In the case at bar, an informative record on this point was developed, the first and only such record to reach the supreme court below.[34]

The four prior records contained the "assessment sheet data" concerning one or two railroads for only a small number of years and the testimony of Raymond S. Danis, the Director's "Supervisor of Railroad Assessments," that the assessments of the property of the two or three railroads for the one or several tax years at issue were at 100% of value. In *Hillison* the court below noted: "There being no evidence in the record to overcome presumption that the Department complied with the law [the statute] in assessing railroad property, even though it departed from the law [statute] in equalizing other property, [no mention of constitutional requirements of uniformity and related presumptions of administrative compliance] the trial court was warranted in finding the defendant's property was assessed at 100% of its full value." 22 Ill. 2d 88, 102. "There is no evidence in the Record to overcome

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[34] People ex rel. Korzen v. CB&Q, 32 Ill. 2d 554, 209 N. E. 2d 649 (1965) (Cook County) (tax year 1957), and the instant case were argued before the Supreme Court of Illinois on the same day, March 18, 1965. II Ill. Sup. Ct. Rec. 73. The railroads' reply brief in the instant case was filed on April 6, 1965. *Id.* at 84. The People's responsive brief was filed in the Madison County case on April 20, 1965. *Id.* at 88. On May 7, 1965, the railroads' "Motion to Strike the People's Second Brief" was taken with the case. *Id.* at 153. On May 20, 1965, the Court's opinion in the Cook County case per Justice House was filed, and on June 24, 1965, the Court's opinion in the instant case, per Justice House, was filed. Cook County's case was based on the contention that railroad transaction prices rebutted the statutory presumption of full value assessment. The Abstract of Record and the issues argued did not involve the equalized level of assessment of locally assessed property in Cook County. In his brief, the Appellee in *Korzen* did not emphasize constitutional questions argued by the Appellant in the Madison County case now before this Court.

the presumption [statutory] and the proof, and we must conclude that objectors' property was assessed at 100%." *Kohorst* at 22 Ill. 2d 104, 109. See n. 2 at 2 *infra*. In *Wenzel,* the People did not argue railroad valuation. In *Enrietta* the court wrote that "judgment must be used by appraisers in the intricate problem of arriving at an assessed valuation of a railroad," 29 Ill. 2d 605, 608. The previous records did not include the data sheets which prove that the effect of the "judgment factor" was to eliminate the influence of price level increases and property acquisitions in assessing the property of Illinois railroads.

The trial court in the case at bar on an adequate record rejected both the Directors' "equalization factors" vis à vis locally assessed property and the "judgment" (or "equalization") factors used by the Director in assessing railroad property. Relying on the data, the trial court determined the values and derived levels of assessment accordingly. Perceiving that the Directors of Revenue had ignored price level increases across the board, the trial court wrote:

> "Ordinary taxpayers' property may be taxed at full market value based upon cost (a sale item) though it may never have any income producing value and though ownership equity (stock and debt) is not even ascertainable. The result of this disparity may be that a tax law is substantially mitigated in favor of the railroad taxpayer by use of the income and market factors. Such an analysis may not call for the relationship of the income and market factors, but it does tend to warrant the ⅓-⅓-⅓ straight average as stressed by the witness, Cohen." Jurisdictional Statement A. 29-30.

With deference we submit that the issue decided by the Supreme Court of Illinois was not, as stated at Appellees' 7, simply "whether the railroads' properties were

assessed at full, fair cash value for the years in question." The issues emerging from the record and now before this Court are more sophisticated, as Appellant's Briefs and Petition for Rehearing below, the Jurisdictional Statement and this Brief suggest. Confronted with an adequate record on both the Director's equalizations of locally assessed property and assessments of railroad property, the supreme court below in reversing the trial court articulated its position on the Directors' uniform elimination of the price level increases in valuing state assessed railroad property. Mandating deflated valuations of railroad property which reflected no influence of inflation and capital expenditures of the past sixteen years, and deriving 100% levels of assessment, the Supreme Court of Illinois quoted a railroad witness for support:

> "He [H. Clyde Reeves] testified that if a formula incorporated Interstate Commerce Commission valuations as substantial indices of value, that a substantial judgment factor must be used 'to get them out.'" Jurisdictional Statement A-11.

No mention was made of exclusive reliance on inflated price levels in valuation of non-railroad property which had been mandated by the trial court in the same case, obeying the mandate of its four prior decisions.

The *deus ex machina* of the Supreme Court of Illinois' one-sided elimination of the influence of price level increases and property acquisitions in railroad property valuations to implement judicially determined equalization has been the "judgment" of Raymond S. Danis, the Director of Revenue's "Supervisor of Railroad Assessments," 1949-1960. Yet, in 1950, when the Director perhaps hoped that inflation would subside,[35] Mr. Danis had stated:

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[35] Cf. ". . . now we seem to be at the place where property taxes are continuing to increase whereas prices have leveled off or possibly declined in some cases." Maynard, "The Illinois Program

> "Our court and state statutes have dictated[?] that judgment should play a very important role in the assessment process; however, this judgment should be based on **objective** standards. In other words, **our judgment should have some scientific basis.**" ASSESSMENT ADMINISTRATION: 1950, p. 152 (National Conference of Assessment Administrators) (in Library of Congress).

By way of justifying judicial reliance on amorphous "judgment" in the valuation of railroad property, the court below also utilized purported language of Justice Holmes about "tangled impressions" **in the valuation process.** Jurisdictional Statement A-6. The Appellees utilized the same quotation at 14 of their Motion to suggest that the state tax administrators in Illinois have relied upon the "tangled impressions" approach to valuation. The quotation has been used twice out of context, once from the 1907 *Babcock* case and once from the 1939-40 Tax Commission Report. The Appellees fail to convey accurately Justice Holmes's and the Illinois tax administrators' respect for facts.[36] In rejecting the influence of price level

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of Equalization," Proceedings of the 42nd National Conference of the National Tax Association 272 (Sept. 1949) (Chief of Property Tax Division, Chicago office, of the Illinois Department of Revenue). See Appendix B at v *infra*.

[36] The railroad sponsored explanation of the administrative "judgment factor" reduction is set forth at their 17 n. 9 without mention of the underlying administrative data set forth at Appendix E of the Jurisdictional Statement A-51 which prove the explanation to be nothing more than rationalization. The opinion of the court below quotes Justice Holmes as follows:

> "All through the process of determining an assessment the necessity for utilizing judgment arises, and in the final summary the tangled impressions act directly on the result. (The term 'tangled impressions' **refers to Mr. Justice Holmes' description of the process of arriving at valuations** in Chicago, Burlington & Quincy Railroad Co. v. Babcock, 204 U. S. 598, 51 L. Ed. 636, where he said, 'They express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions,—impressions which may lie

changes, and in relying on "judgment" for purposes of property tax valuation of railroad property, the opinion of the court below is in direct conflict with its earlier decisions involving rate base valuation of utility property.

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beneath consciousness with and losing their worth.')" (Jurisdictional Statement A-6).

Justice Holmes' 1907 language was not a reference to **valuations** of property, but rather to allocations of value already determined between constituent parts of a railroad system. What the Justice actually wrote was:

> "Various arguments were addressed to us upon matters of detail which would afford no ground for interference by the Court, and we do not think it necessary to state at length. Among them is the suggestion of arbitrariness at different points, **such as the distribution of the total value set upon the Chicago, Burlington and Quincy System, among the different roads making it up.** But the action does not appear to have been arbitrary except in the sense in which many honest and sensible judgments are so. They express an intuition . . ."

At 14-16 the railroads quote Justice Holmes's statement out of context from the 1939-1940 Annual Report of the Tax Commission, just as they represented it in their Abstract for the supreme court below. In fact, the quote is from a discursive pro and con discussion of the formulaic approach to valuation of railroad property, which concludes with this subsequent language overlooked by the railroads at 92 of the Annual Report for 1939-40, I Exhibits:

> "With all its shortcomings, **a good formula will produce results having advantages which far outweigh the disadvantages that an undocumented judgment brings about.** It lends a certainty and definiteness to the assessment process which safeguards not only the tax administrator but the taxpayer as well . . . as long as the rules governing the use of a formula are uniformly applied, any modification of the result can be limited to a consideration of **evidence** not taken into account in the formula."

The repeated misuse of Justice Holmes's 1907 statement obscures Justice Holmes's respect for the facts in constitutional litigation. In his dissent in Lochner v. New York, 198 U. S. 45, 76, he had stated: "General propositions do not decide concrete cases." On May 26, 1919, about three years after Justice Brandeis' accession to the Court, Justice Holmes wrote to Sir Frederick Pollock:

> "Brandeis the other day drove a harpoon into my midriff with reference to my summer occupations. He said you talk

E. g., Illinois Bell Tel. Co. v. Ill. Com. Co., 414 Ill. 275 (1951).[37]

X. APPELLANT REQUESTS PLENARY CONSIDERATION OF QUESTIONS INVOLVING FOURTEENTH AMENDMENT EQUAL PROTECTION LIMITATIONS DEVELOPED AT THE INSTANCE OF THE RAILROADS.

In 1907, at the instance of Illinois utility taxpayers, this Court announced: "The claim that the action of the State Board of Equalization [Illinois] in making the assessment

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about improving your mind, you only exercise it on the subjects with which you are familiar, why don't you try something new, study some domain of fact. Take up the textile industries in Massachusetts and after reading the reports sufficiently you can go to Lawrence and get a human notion of how it really is. I hate facts. I always say the chief end of man is to form general propositions—adding that no general proposition is worth a damn. Of course a general proposition is simply a string for the facts and I have no doubt that it would be good for my immortal soul to plunge into them, **good also for the performance of my duties,** but I shrink from the bore." Letter from Justice Oliver Wendell Holmes to Sir Frederick Pollock, May 26, 1919, in *II Holmes—Pollock Letters* 13-14 (Howe ed. 1946); Letter from Justice Oliver Wendell Holmes to Lewis Einstein, May 22, 1919, in *Holmes-Einstein Letters* 187 (Howe ed. 1964) ("I hate facts, but I feel as if it might be a solemn call to duty. We shall see. . ." in referring to Justice Brandeis' suggestion mentioned in the letter to Pollock four days later.)

[37] In Illinois Bell, the Supreme Court of Illinois formulated standards of value of property for rate making purposes at the instance of the utility. Following the onset of inflation after World War II, the court below held that the Illinois Commerce Commission must "take into account current economic conditions, present price levels, and reproduction costs," and reversed the decision of the administrative body **which had made a "judgment estimate" excluding the influence of current price levels and reproduction cost from rate base value.** The Court stated **"It [the judgment estimate] is supported by no evidentiary findings and has no basis in the record of the case."** See also City of Alton v. Ill. Com. Com., 165 N. E. 2d 513, 517 (1960) where the Supreme Court of Illinois affirmed the Circuit Court of Madison County, per Judge James O. Monroe, Jr., the trial judge in the case at bar, who had reversed the Illinois Commerce Commission for failure to require specific evidence supporting the overhead factor in the reproduction

. . . would violate the provisions of the Fourteenth Amendment . . . by taking property of the appellee without due process of law, and by failing to give it equal protection of the laws constitutes a Federal question **beyond all controversy.**" *Raymond, Treasurer of Cook County, Illinois v. Chicago Union Traction Co.*, 207 U. S. 20, 35, 42 (1907) (tax year 1900).[37a] Subsequent confirma-

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cost valuation finding, *i. e.*, the Judiciary rejected an administrative "judgment factor" inflating property valuation. See also CB&Q v. Dept. of Revenue, 17 Ill. 2d 376, 383-4 (1959) where the court refused to accept testimony by the "railroad assessor" that the proper rate for capitalizing income was 6%, writing "the basis for its [Department's] findings are not subject to evaluation. We cannot determine the proper rate of capitalization .... If capitalized earnings are to have relevance as an indicia of value, a 'judgment' reduction in the final assessment is no answer." In 1955 the court perceived the "judgment factor" utilized by the tax administrator in reducing the elements of value, and commented: "The record does not disclose the basis for these reductions, either in the plaintiff's case or in the case of other railroads." *Id.* at 6 Ill. 2d 278, 289.

The railroad industry uses reproduction cost to value equipment for computing damages to property and some railroads use it to boost the value of equipment so as to justify argument to Congress that there should be higher per diem charges for car rentals (even reproduction cost of "modern type car replacement" rather than of "replacement in kind"). See "Interchange Rules" of the AAR, Rule 112, Section A; Hearings before the Freight Car Shortage Subcommittee of the Senate Committee on Commerce, 87th Cong., 1st Sess. (1961). Apparently, the last decision of this Court on railroad property valuation for property tax purposes is Great Northern Ry. v. Weeks, 297 U. S. 135, 139 (1936). The opinion of the Court, per Mr. Justice Butler, stated: "The principles governing the ascertainment of values for the purposes of taxation are the same as those that control in condemnation cases, confiscation cases and generally in controversies involving the ascertainment of just compensation." Rowley v. C&NW, 293 U. S. 102 (1934) (Butler, J.), cited by railroads at 15, reviewed federal court action which had interfered with state administrative distribution of the property tax burden and reversed the lower court, leaving the administrative distribution of the property tax burden intact.

[37a] The interpretation of the Fourteenth Amendment as a proscription of property tax discrimination resulted from railroad argument. Leading up to the 1907 declaration of this Court, that the interpretation was "beyond all controversy," was a line of cases in which railroads urged the application of the Fourteenth Amendment against state action. County of San Mateo v. So. Pac.

tion of limitation was elicited from this Court by railroad taxpayers in *Greene v. L&I Rr.*, 244 U. S. 499, 502 (1917); *Southern Rr. v. Watts*, 260 U. S. 519, 521, 525-6 (1923); *Chicago Rr. v. Kendall*, 266 U. S. 94, 95 (1924); *Nashville C&St.-L. Rr. v. Browning*, 310 U. S. 362 (1940). The limitations have also been confirmed at the instance of non-railroad taxpayers. *Sunday Lake Iron Co. v. Wakefield*, 247 U. S. 350, 353 (1918); *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441, 446-7 (1924); *Cumberland Coal Co. v. Board*, 284 U. S. 23, 24-5 (1931); *Iowa-Des Moines Bank v. Bennett*, 284 U. S. 239, 245 (1931); *Hillsborough v. Cromwell*, 326 U. S. 620, 623 (1945); *Waters v. City of St. Louis*, 374 U. S. 231, 237 (1954). As Mr. Justice Fortas recently observed, "Its [the Fourteenth Amendment's] sole office was to impede state regulation of railroads or other corporations. . . . See Stampp, The Era of Reconstruction" *United States v. Price*, 34 U. S. L. Week, 4313, 4317 n. 9 (U. S., March 28, 1966). See also *Graham, Builded Better Than They Knew: Part 1: The Framers, the Railroads and the Fourteenth Amendment; 17 U. of Pitt. Law Rev. 537 (1956)*. SWISHER, STEPHEN J. FIELD 250-61, 415-16 (Archon Books ed. 1963).

The questions presented will, if decided by this Court, further the interest of the railroads as well as Appellant's

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Ry. Co., 13 Fed. 722, 733-38 (Field, Circuit Justice, 1882), dismissed per stipulation, 116 U. S. 138 (1885); County of Santa Clara v. So. Pac. Rr., 18 Fed. 385, 390 (Field, Circuit Justice, 1883), aff'd on other grounds, 118 U. S. 394 (1886); Bell's Gap Rr. v. Pennsylvania, 134 U. S. 232 (1890); Railroad and Telephone Companies v. Board of Equalizers, 85 Fed. 302, 317 (C. C. M. D. Tenn. 1897) (tax biennium 1897-99); Nashville & St. L. Rr. v. Taylor, Governor, 86 Fed. 168, 179 (C. C. M. D. Tenn. 1898) (tax biennium 1897-9); cf. Taylor, Governor, v. L. & N. Rr., 88 Fed. 350, 362 (6th Cir. 1898) (Taft, J.); Louisville Trust Co. v. Stone, 107 Fed. 305, 306 (6th Cir. 1901) (Day, J.); Coulter v. L. & N. Rr., 196 U. S. 599, 609 (1905) (tax year 1902). "From the low level of 1897 they [prices] rose 21 per cent to 1900. . . . In the Bureau chart the 1913 prices are taken as the datum line (100). As compared with them the 1897 level was 67, the 1900 level 81." Mr. Justice Brandeis, concurring in Southwestern Bell Tel. Co. v. Mo. Pub. Serv. Com., 262 U. S. 276, 289, 303 n. 15 (1923).

interest. Reversal of the judgments entered by the Supreme Court of Illinois will reinstate the trial court's judgments, which also grant relief to the railroads. The predicate of Appellant's position is that the Fourteenth Amendment requires that the railroads (and other taxpayers) shall have relief from substantial discriminatory taxation; but at the same time the fact of discrimination, its substantiality and its precise extent must, if determined by the Judiciary, derive from rational evidence and reasonably uniform valuation methodology. Appellant submits that the filing by the railroads of their Motion to Dismiss or Affirm, and its tenor, permit the inference that they seek at the hands of the Judiciary something more than uniformity, something more than equal protection.

Appellant submits that focus on the questions presented is sharpened by consideration of the nature of the case. This case is not one in which the level of assessment of state assessed property is agreed between the parties or conceded by public officials. This case is not one involving an appeal from an administrative agency, or one involving injunctive relief against certification of a state assessment or one involving injunctive relief against the collection of taxes. In all such situations, if relief is granted, the Judiciary need not find the amount of discrimination, but need only find that discrimination existed to a substantial degree. This case is not one in which the state judiciary denied relief to the taxpayer. This is not a case in which the trial court denied relief and the supreme court of the state reversed to grant relief. Rather, this case is one in which the Supreme Court of Illinois reversed and doubled the relief. It is a case in which the Illinois judiciary has not only determined the fact of discrimination but also the amount thereof, thereby rendering valuation methodology an issue indispensable to decision. Thus were its progenitors, *Hillison* and *Kohorst*, of national importance to the rail-

road industry. See note, Map #3, Appendix B at v, *infra*. If the structure of the case at bar in these respects is not unprecedented, at least it is unusual and affords the adequate record which plenary consideration of constitutional questions deserves and sound constitutional decision requires.

At this time, history is in the process of repeating itself but in a much broader and more consequential manner than at the turn of the century. Based on allegations of underassessment of locally assessed property and discrimination against state assessed railroad property, there developed seventy or so years ago some cases in the Sixth Circuit, involving two district court decisions, 1897-1898, by Judge Clark of the federal court for the Middle District of Tennessee, and two Court of Appeals' decisions (in cases appealed from Tennessee federal district courts) by Judges Taft and Day, 1898-1901. See n. 37a at p. 71 *supra*. These four decisions all had two things in common. First, they ordered property tax relief for the railroads by way of injunction; second, it was necessary for the court to decide the amount of relief and valuation methodology was not involved.

Again, the L & N Rr. is involved in similar litigation in the Court of Appeals for the Sixth Circuit, from the Middle District of Tennessee. *L. & N. Rr. v. Pub. Service Com. of Tenn. et al.*, 249 F. Supp. 894 (M. D. Tenn. 1966), *appeal docketed,* No. 17180, 6th Cir., April 4, 1966. We set forth at A. 53-71 of the Jurisdictional Statement Judge William E. Miller's opinion which ordered injunctive relief for the L & N, without reaching measurement of railroad property level of assessment. The Sixth Circuit Court of Appeals is again to be called upon to determine the fact of discrimination and whether injunctive relief is proper. However, in 1966 that Court will be called upon by the railroad to do more—reconsider an intervening decision by this Court, *i. e., N. C. & St. L. Rr. v.*

Browning, 310 U. S. 362 (1940) (Frankfurter, J.), which Appellant discussed at 42-45 of the Jurisdictional Statement. We invite this Court's attention to the fact that the record before the Sixth Circuit Court of Appeals affords scant insight into the railroad property assessment procedures of the Tennessee administrative process. The only testimony before the district court was in the form of an 80-page transcript of a hearing before the Tennessee State Board of Equalization held on October 25, 1965. In that hearing the railroads, with delusive magnanimity, agreed not to contest that the assessments were at 100% of value (See n. 17, at 22 *supra*). The federal court record involves only the L & N's assessment for 1965-1967, a biennial one.

Fallacies underlying judicially enforced or judicially determined equalization between state-assessed property valued without regard to the inflated price level and investment, and locally assessed property valued by use of inflated "**spot**" prices, have been defined by two former tax administrators of the Illinois Department of Revenue: Lynn A. Stiles, Railroad Assessor, 1943-49, now at the Federal Reserve Bank in Chicago, and Eugene L. Maynard, Supervisor of the Chicago office of the Property Tax Division, now retired. Both economists have enjoyed a national reputation. In 1948 Stiles delivered "Equalization of Railroad Assessments" at the Fourteenth National Conference of the National Association of Assessing Officers. ASSESSMENT ADMINISTRATION: 1948; pp. 105-107 (in Library of Congress):

> "If in analyzing the local roll [,] selling price in today's market is taken as the criterion of 'full value,' then it follows that the resulting assessment ratio can be used in the debasement of central assessments **if these are the conceptual equivalents of today's real estate selling prices** . . .

"Real estate is being bought and sold in 'today's inflated market.' So also is rail investment in plant and equipment. Configurations of just such inflated prices give the pattern of today's value relationships. Granted that prices are higher now than 10 years ago or even conceding that they are higher now than they will be 10 years hence, the fact is that they establish relative values as they are at present. The job of assessment is that of establishing a set of relationships, to provide an allocation of relative liability to share in a tax. **It is submitted, therefore, that current market price should be used in arriving at the valuations to be assigned to rail investment. Current 'spot' multipliers then, as against 'period prices' or arbitrary 'normal period' prices, furnish the only proper means whereby ICC inventories—in terms of road and equipment accounts—can be translated into a realistic and meaningful assessment criterion on a parity with capitalized earnings and a present market appraisal of stock and debt.**

"If these steps can be taken, the process of central assessment will yield meaningful and **objectively defensible full valuation data. Then, by a suitable policy of equalization the results can be brought into alignment with the level of local assessments. To do otherwise** means that equalization, if such it can be termed, is achieved by infusing the process of central assessment with the perspectives and blindnesses which pervade the whole field of local assessment. That the result can yield a pattern of just and rational tax liability allocation becomes then largely a matter of chance."

Accord, Maynard, "Can the Value of State Assessed Utility Property Be Compared With the Value of Locally Assessed Property?" REVENUE ADMINISTRATION: 1955, p. 32 (published by National Association of Tax Administrators).

The key decision of this Court which applies the Fourteenth Amendment to invalidate State action based on arbitrarily disparate property tax valuation methods is *Cumberland Coal Co. v. Board,* 284 U. S. 23-25, 30-1 (1931). Appellant respectfully submits that recent pronouncements of this Court appear to suggest that the judgments of the supreme court below raise questions which deserve plenary consideration. In the opinion delivering the judgment of the Court in *Harper v. Butts,* 43 U. S. L. Week 4305, 4306-07 (U. S., Mar. 22, 1966), Mr. Justice Douglas wrote:

> "In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time decreed to be the limits of fundamental rights . . . . Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change . . .
>
> "We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined . . . . ." (Emphasis not added.)

We submit that even the differing emphasis articulated by Mr. Justice Black suggests that the questions presented deserve plenary consideration. He wrote, dissenting at 4307, 4308,

> "The equal protection cases carefully analyzed boil down to the principle that distinctions drawn and even discriminations imposed by state laws do not violate the Equal Protection Clause **so long as these distinctions and discriminations are not 'irrational,' 'irrelevant,' 'unreasonable,' 'arbitrary,' or 'invidious'."**

XI. IN CONSTITUTIONAL LITIGATION THIS COURT HAS REJECTED JUDICIAL VALUE "FINDINGS" FOR RAILROAD PROPERTY BASED UPON STATE TAX ADMINISTRATORS' FIGURES BECAUSE OF INADEQUATE EVIDENTIARY SUPPORT.

The judgments of the Supreme Court of Illinois, to the extent that they rest on value "findings" for railroad property incorporating huge administrative "judgment factor" reductions, are in conflict with *Missouri Rate Cases,* 230 U. S. 474 (1913) (Hughes, J.). In that case, eighteen railroads assailed state action in the form of legislative enactments prescribing maximum freight and passenger rates after 1905 and 1907. One attack, based upon the due process clause of the Fourteenth Amendment, was that the legislation was confiscatory. The effort of the railroads was to inflate the value of their property by use of "judgment." The lower court there, as here, had invalidated the state action. There, the action invalidated was legislative; here, the action invalidated was administrative. At 497 Mr. Justice Hughes stated that the "findings of value" by the lower court were based on those made by the state assessing board for the purpose of taxation. With reasoning germane to the "judgment factors" **rejected** by the Circuit Court of Madison County below and **employed** by the Supreme Court of Illinois, Mr. Justice Hughes at 498 observed that there was no satisfactory proof of the administrators' judgment and at 499 stated:

> "On examining the evidence, however, we find it to be too general and inconclusive to be regarded as sufficient proof to sustain the values as found.
>
> Undoubtedly, the companies possessed valuable terminals, but what the values were was not suitably shown. There is an absence of evidence, appropriately specific, dealing with the lands, improvements, structures, equipment and other property owned by

each company and showing what the various items of property were worth. It would seem manifest from the character of the evidence which can be supposed to have relation to value, that reliance was principally placed upon estimates of the state assessing board. There was proof of the amount of stocks and bonds, of earnings, and also testimony as to the cost of certain recent construction, but while these matters could properly be considered in reaching a conclusion, we fail to find any adequate basis for the definite findings of value that have been made . . . . ."

At 501 with regard to valuation of CB&Q property, the Court's opinion stated,

> "Manifestly, a finding of confiscation could not be **based on such a valuation** in the absence of clear and convincing proof that the value actually existed **and that the different items of property were estimated respectively by correct methods and in accordance with proper criteria of value. This proof was lacking.**"

XII. ORDERS COMPUTING REFUNDS PURSUANT TO MANDATE OF SUPREME COURT OF ILLINOIS AS PREPARED AND SUBMITTED BY THE RAILROADS WERE ENTERED BY THE TRIAL COURT ON WEDNESDAY, APRIL 20, 1966; RAILROADS' CONTENTION THAT THE JUDGMENTS APPEALED TO THIS COURT ARE NOT FINAL LACKS SUBSTANCE.

Appellees devote their pages 2, 3, 21-23 to the contention that the judgments of the Supreme Court of Illinois appealed to this Court are not "final" within the provisions of 28 U. S. C., § 1257. The railroads' theory is that the trial court had not as of the date of their Motion entered orders computing the precise amount of the refunds ordered by the Supreme Court of Illinois; that the Appellant and the railroads had been in dispute

about details of the refund computation; that implementation of the mandate of the Supreme Court of Illinois has been delayed by controversy over whether tax "levy" or tax "extension" should be used in recomputing tax rates. The railroads represented at 3 that they had tendered refund orders and at 22 stated that if the orders were not entered by the trial court as they proposed, there may arise federal questions of due process and equal protection which might lead to further appeals to this Court. At 22 n. 13, the railroads state they have filed here nine copies of a trial court record of developments since the filing of the state supreme court mandates in the trial court. See Appendix C at vii *infra*.

On Wednesday, April 20, 1966, Appellant filed a statement with the trial court withdrawing any objection to the precise method of refund as proposed by the railroads, at the same time preserving the questions presented here. (Nine certified copies of this statement are on file with the Clerk of this Court.) On the same date the trial court entered the orders drafted and presented by the railroads. (A certified copy of each of these forty-six orders is on file with the Clerk of this Court, as are nine certified copies of the trial court's docket order relating to its action.)

These orders are the very orders tendered by the railroads to the trial court on November 30, 1965, and have since been lodged with the Clerk of the trial court. Assuming the validity of the mandate of the Supreme Court of Illinois, Appellant does not object to the precise method of refund proposed by the railroads and employed in the orders entered by the trial court.

In view of the appeal to this Court and the assertion by the railroads that the judgments appealed are not final, Appellant on April 21, 1966, filed Notices of Appeal in the trial court to the Supreme Court of Illinois from the April 20, 1966, orders, asserting only that the orders, to the extent that they implement the mandate of the

Supreme Court of Illinois issued after the entry of the judgments now appealed to this Court, violate constitutional mandates. (A prototype of these Notices of Appeal is set forth as Appendix D at ix *infra*, and nine certified copies of a prototype are on file with the Clerk of this Court.) The railroads cannot appeal from the April 20, 1966, orders because the orders give them exactly what they have demanded. These orders implement the judgments of the Supreme Court of Illinois and figure the refunds in all respects as proposed by the railroads. Appellant concedes that the only recourse is in the questions now presented to this Court. In short, Appellant's Notice of Appeal of April 21, 1966, is designed solely to preserve the questions now presented to this Court, so that in the event that this Court should conclude that the judgments now appealed to this Court are not final, further proceedings may be pursued. On April 21, 1966, Appellant also filed with the trial court Motions that the appeals of April 21, 1966, operate as supersedeas without bond. ILL. REV. STAT. c. 110, § 82 (3) (1965). On the same date the trial court entered orders granting the relief prayed, and the effect of the April 20, 1966, orders is now stayed, pending appeal to the Supreme Court of Illinois.

This Court has traditionally given the jurisdictional requirement of "finality" a practical rather than a technical construction. The opinion of this Court in *Gillespie v. U. S. Steel Corp.*, 379 U. S. 148, 152 (1964) per Mr. Justice Black stated:

> ". . . this Court has held that the requirement of finality is to be given a 'practical rather than a technical construction.' Cohen v. Beneficial Industrial Loan Corp., 337 U. S. at 546. See also Brown Shoe Co. v. United States, 370 U. S. 294, 306; Bronson v. Railroad Co., 2 Black 524, 531; Forgay v. Conrad, 6 How. 201, 203. Dickenson v. Petroleum Commission Corp., 338 U. S. 507, 511, pointed out that in deciding the question of finality the most important competing

considerations are the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other."

In 1963 Mr. Justice White, writing for the Court, stated: "The Court has long given this provision of the statute this practical rather than a technical construction." *Construction Laborers v. Curry*, 371 U. S. 542, 549 (1963). In 1962 Mr. Chief Justice Warren, writing for the Court, mentioned "practical considerations" and that "Repetitive judicial consideration of the same question in a single suit will not occur here." *Brown Shoe Co. v. United States*, 370 U. S. 294, 309, 311 (1962). In 1952 Mr. Chief Justice Vinson, writing for the Court, concluded that for "all practical purposes" the litigation was terminated. *Pope v. Atlantic Coast Line Rr. Co.*, 345 U. S. 379, 382. In a 1948 5-4 decision, Mr. Justice Black, Mr. Justice Burton and Mr. Justice Murphy joined in the dissenting opinion of Mr. Justice Rutledge, which articulated as follows:

> "The 'penumbral' area of appealable finality, see 326 U. S. at 124, may not be sweeping in its scope. It is nevertheless one essential to prevent the letter of the section from overriding its reason. For this purpose it would seem to comprehend any situation preventing separable phases of litigation, one involving the core or crux of the controversy between the parties, the other collateral matters dependent for the necessity of their consideration and decision upon final and unqualified disposition of the hub of the dispute. If a merely mechanical application of § 237 is to be avoided, it cannot be taken that the practical approach of the WOW line of decisions must be limited exclusively to cases where an accounting is ordered to follow delivery of property decreed at the same time."

Republic Natural Gas Co. v. Oklahoma, 334 U. S. 62, 74, 77-8, 84-5. A "practical" approach has also been imple-

mented by Mr. Chief Justice Chase in *Thompson v. Dean*, 74 U. S. (7 Wall.) 343 (1868); by Mr. Justice Davis of Illinois in *Bronson v. Railroad Co.*, 67 U. S. (2 Black) 524, 526, 528-9 (1862); by Mr. Chief Justice Taney in *Forgay et al. v. Conrad*, 47 U. S. (16 How.) 203 (1848); and by Mr. Chief Justice Marshall in *Ray v. Law*, 7 U. S. (3 Cranch) 179, 180 (1805).

In the case at bar, Appellant has no federal questions to raise other than those which are now presented to this Court. The railroads cannot have any to present below or here because of the trial court's orders of April 20, 1966. A decision by this Court that the judgments now at the bar of this Court are not final will leave Appellant with the task of processing the April 20, 1966, orders, obtaining judgments of the Supreme Court of Illinois on questions already decided by that court, and once again with the same questions and virtually the same record appealing to this Court. The questions now before this Court are the "hub" of the litigation. The issues on refund computation have already been decided by the Supreme Court of Illinois, and any minor problems which might have arisen could not, in our view, remotely have given rise to a substantial federal question.

The litigation, in some of its aspects, is already almost eight years old. Expenses are already substantial. Both Appellant and the railroads are in need of the tax money in escrow, and the rightful owners of the money have been deprived of its use for years. In *Construction Laborers v. Curry supra* this Court mentioned in finding "finality" that the party seeking review by this Court had conceded that he had no other federal claim to present. *Id.* at 551. We submit that here there is no danger of fragmentary appeals and that the analogous line of authority described as "the accounting cases" warrants a finding of "finality" under the circumstances of this case.

Appellant refers to the "Short Statement and Brief" filed by the railroads in the trial court on February 21,

1966, the very date on which the Appellant docketed this case in this Court. (The railroads have lodged a certified copy of that "Statement and Brief" with the Clerk of this Court.) At 3 the railroads **represented to the trial court** anent refund computation that "state and federal questions of the greatest importance to all parties concerned are involved in these questions. **We believe they were settled by Musso** [the case at bar]." Yet, the railroads on March 23, 1966, filed here their Motion to Dismiss or Affirm, and **represented to this Court** that the judgments entered below by the Supreme Court of Illinois on the core—the crux of the litigation, brought here by the Appellant, do **not** raise federal questions.

CONCLUSION.

For the foregoing reasons, Appellees' Motion to Dismiss or Affirm should be denied and jurisdiction noted and certiorari granted.

Respectfully submitted,

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April 23, 1966

APPENDIX A.

"Uniformity" and "Overassessment" Litigation Instituted by Railroads.

In addition to the cases cited at v-vii of the Jurisdictional Statement involving railroad complaints about property taxes are the following:

Alabama.

Pending in the Circuit Court of Montgomery County, for 1964-5 assessments:

Illinois Central v. State (2);
Seaboard Air Line Rr. v. State (2);
GM&O v. State (2);
Atlantic Coast Line v. State (2);
Birmingham So. Rr. Co. v. State;
Southern Ry. Co. v. State;
Alabama Great So. Ry. Co. v. State;
Central of Georgia v. State;
Birmingham Terminal Co. v. State;
Woodstock & Blocton Ry. v. State;
A-T. & N. R. Co. v. State;
Birmingham Belt Rr. v. State;
St. Louis and San Francisco Ry. Co. v. State;
Louisville & Nashville Rr. Co. v. State.

California.

Forty-eight separate suits were filed for the tax year 1958 by Southern Pac. Co. Later dismissed.

Florida.

Seaboard Air Line Rr. v. Gay, 745 2d 569 (1954);
Green v. Florida E. Coast Ry., 141 S. 2d 326 (1962);

Florida East Coast Rr. Co. v. Green, 178 S. 2d 355 (1965), (on appeal to Supreme Court of Florida).

Indiana.

State Board of Tax Commissioners v. C. M. St. P. & P. Rr., 96 N. E. 2d 279 (1951).

Iowa.

The C&NW is litigating state assessments of its property for 1963, 1964 and 1965 in the District Court of Polk County. Nos. 69276, 70043, 71193. State assessments of the C&NW's property (as well as other railroads in Iowa) have been held stable since 1946 and indeed since 1959 have been progressively lower. Letters from Ballard B. Tipton, Director, Property Tax Division, Iowa State Tax Commission to Burton C. Bernard, March 21, 25, 1966 (assessments for all railroads 1946-1965 enclosed). There have been "judgment factor" reductions in Iowa's assessments of railroad property. C&NW v. State Tax Com., 137 N. W. 2d 246 (1965).

Michigan.

C&NW v. Dept. of Rev., Civil No. 5148, W. D. Mich. (pending).

Missouri.

Norfolk & Western Ry. Co. v. State Tax Com., Circuit Court, Cole County (on appeal to Supreme Court of Missouri).

New Jersey.

Declaratory judgment actions pending in the Superior Court of New Jersey involving 1966 assessments:

Lehigh Valley Rr. Co. v. Kingsley, et al.;
Erie Lackawanna Rr. Co. v. Kingsley, et al.;

New York Central Rr. Co. v. Kingsley, et al.;
Pennsylvania Rr. Co. v. Kingsley, et al;

Pending appeals to the State Division of Tax Appeals:

167 railroad appeals for years 1953-1965 which have not yet reached the trial calendar;
Del., Lackawanna & Western Rr. Co. v. Director, 23 N. J. 561 (1957);
Lehigh Valley Rr. Co. v. Director, 26 N. J. 173 (1957);
Lehigh Valley Rr. Co. v. Director, 26 N. J. 188 (1957).

New York.

New York Central Rr. v. Assessors of the City of Buffalo, Supreme Court for Erie County. Separate suits filed for each year 1955 through 1965. Some have lapsed. Others settled. Case for 1965 pending.

Oregon.

U. Pac. Rr. v. Hoefke, 376 P. 2d 80 (1962).

South Dakota.

C&NW v. State, Circuit Court, Lincoln County (tax year 1963), on appeal to the Supreme Court of South Dakota.

Tennessee.

L & N Rr. v. Public Service Com. of Tennessee and State Board of Equalization, 249 F. Supp. 394 (M. D. Tenn. 1966), *appeal docketed,* No. 17180, 6th Cir., April 4, 1966;
Southern Rr. v. Clement et al., Chancery Court, Davidson County (tax years 1964, 1965) (on

appeal to the Supreme Court of Tennessee) (1966);

Southern Rr. Co. v. Clement, et al., Chancery Court, Davidson County (tax year 1965).

Virginia.

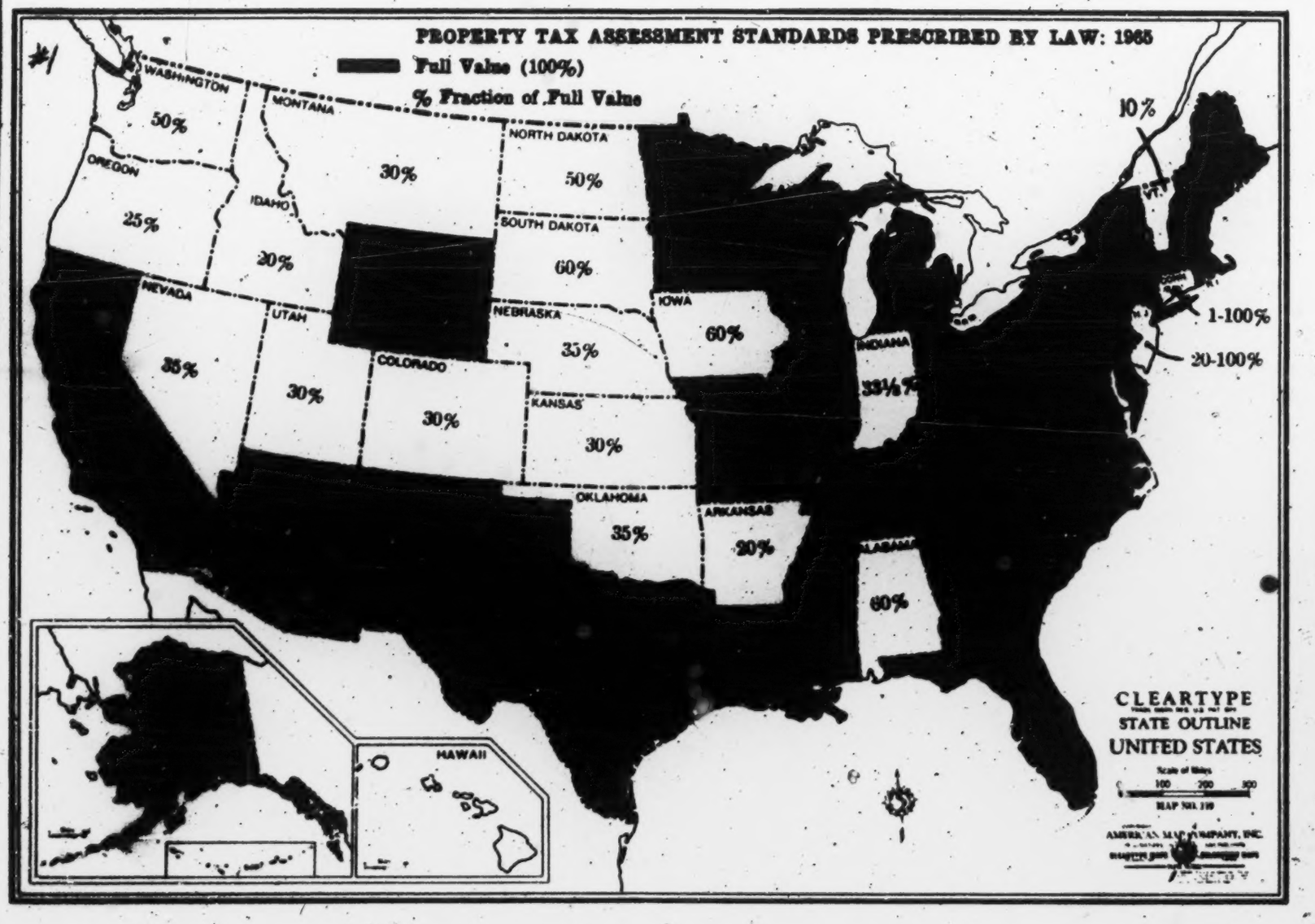
Richmond, Fredericksburg and Potomac Rr. v. Va., 124 S. E. 2d 206 (1962).

Wyoming.

CB&Q Rr. v. Bruch, District Court, Laramie County (pending) (tax years 1964-5).

See Appendix B at v *infra*.

APPENDIX B.



MAP #1

Source: Shannon, "Conflict Between State Assessment Law and Local Assessment Practice," a Paper delivered in June 1965 before the Conference on Property Taxation U. S. A. at Milwaukee. (Dr. Shannon is Senior Analyst, Advisory Commission on Intergovernmental Relations, Washington, D. C.) At least six states changed from a full value standard to a fractional value standard 1956-1965: Colorado, Idaho, Indiana, Kansas, Nevada and New Jersey. In Vermont and Connecticut each local assessor determines the standard for his assessment district. In Hawaii the State Director of Taxation determines the standard.

"Assessment" responsibility is divided between local assessors and state tax administrators according to type of property. Most property is locally assessed. In addition to assessment responsibilities, most state tax administrators also have duties involving inter-county "equalization" of locally assessed property on county-wide bases at the legal standard of assessment. "Level of assessment" of property is the ratio, expressed in percentage, of assessment of property, before or after state equalization, related to the value of that property. The "assessment" of property is a fixed administratively determined figure. It is impossible to derive a "level of assessment" for property without a preliminary determination of the "value" of the property to which the "assessment" figure can be related. Generally post-World War II inflation has caused the "level of assessment" of real estate to decrease to levels far below the legal requirements as "assessments" of real property even after state equalization have failed to keep pace with the inflating price level.

MAP #2

Source: U. S. Bureau of the Census, II Census of Governments: 1962, Taxable Property Valuations 3-4, Tables 2, 25. In 1961, state assessments of railroad property totalled $6,427,000,000. The total state assessment in green colored states was $5,939,000,000. *Id.* at 28-29, 158-60. Illinois, the leading "terminal" state, contained the largest state assessment of railroad property, with Ohio ranking second. Data unavailable for New York and Massachusetts. For the decreasing assessments, see n. 23 *supra*. Most states are "bridge" states, with comparatively little terminal facilities. Bureau of Census data issued in 1957 and 1962 do not include value determinations for railroad property and therefore do not reflect estimated "levels of assessment" for railroad property. However, utilizing its "assessment—sales" ratio determinations based upon sample studies of inflated sales prices related to assessments the Bureau of the Census presented estimated "levels of assessment" for locally assessed real estate. See n. 27 *supra*.

MAP #3

Source: Submission in June 1960 of the American Association of Railroads (AAR) to "Special Study Group on Transportation Policies in the United States" organized pursuant to S. Res. 29, 86th Cong., 1st Sess. (1959). The submission was prepared by a "subcommittee of the Law Committee" of the Association and was also sent to General Counsel of each member railroad in June 1960.

The numbers on the map represent the property tax dollars in millions claimed by the American Association of Railroads in its submission to be the result of unconstitutional discrimination worked against the property of its members for 1957. The total alleged discrimination for 1957 amounted to $141,187,829 or 54% of the ad valorem taxes paid by the railroads in the 31 states listed.

The submission of the Association is based upon an inarticulated premise. The submission does not describe the method by which the value of railroad property was determined or state the values. However, the submission does state that the value of non-railroad property was based upon findings published by the Bureau of the Census in 1957. The levels of assessment estimated by the Bureau of the Census were based upon sales of real estate during a six month period in 1956. Thus the Association figured the value of non-railroad property based upon inflated "spot" sales prices. The submission consisted of five columns of figures for each of 31 states. Column 1 presents "railroad ad valorem taxes" totaling $261,061,831. Column 2 presents "all other railroad taxes" totaling $47,608,400. Column 3 presents "percentage of value at which railroad property assessed." (The lower the value of the property the higher the "percentage" or "level

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Data Corroborative of Property Tax Discrimination Against the People Resulting From Judicially Enforced Equalization Between Locally Assessed Property and State Assessed Railroad Property Based on Valuation of Locally Assessed Property Tied to Inflated Prices and Unit Valuation of State-Assessed Railroad Property Which Eliminates the Influence of Inflated Prices and Increased Investment.

ESTIMATED NATIONAL LEVELS OF ASSESSMENT FOR LOCALLY ASSESSED REAL PROPERTY AND RAILROAD PROPERTY: 1961-2.

(Billions)

(1) Year	(2) Property	(3) Assessed Value	(4) Value	(5) Ratio, (3÷4)
1961	Locally Assessed Real Property	282[a]	970[a]	29%[a]
1961	Railroad Property	7[e]		
1962	Railroad Property		24[e]	29%[f]

[a] U. S. Bureau of the Census, II Census of Governments: 1962, Taxable Property Values 25.

[b] Imputed by Bureau of Census from "sales-assessment" ratios developed on sampling basis for real properties which changed hands during a 6-month period in 1961. *Id.* at 25, 1. "Spot" pricing used.

[c] "The assessment practice in most of the states bears little resemblance to the legal requirements . . . Deep underassessment on virtually a nationwide basis was disclosed by the Census Bureau's assessment-sales ratio study for the '1957 Census of Governments'" I The Role of the States in Strengthening the Property Tax 43 (1963) (Advisory Commission on Intergovernmental Relations)

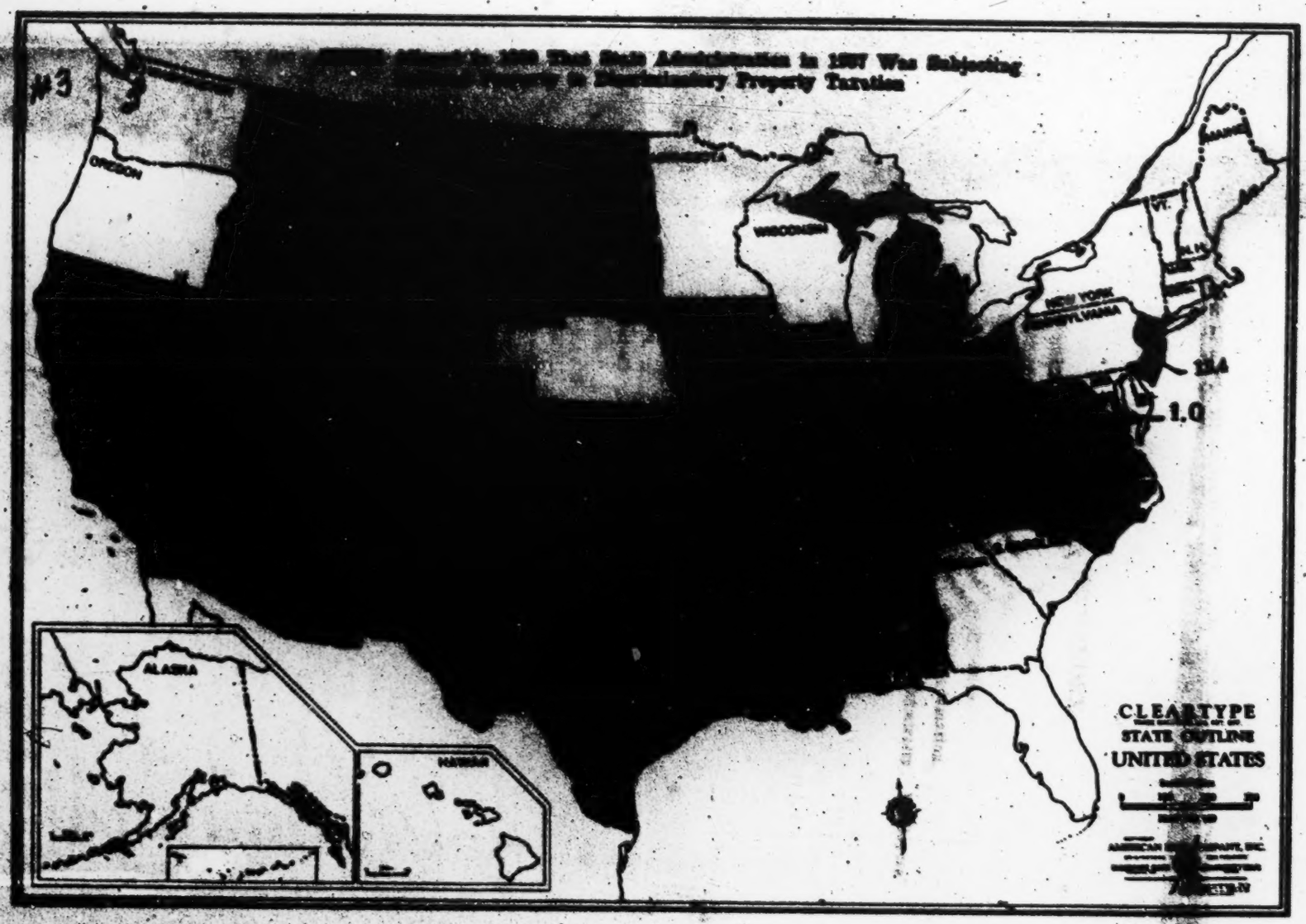
[d] Census of Governments: 1962, Taxable Property Values 28-29, 156-160 (Tables 2, 25). State-assessed railroad property assessments totaled $6,427,000,000. The People have increased the figure to $7,000,000,000 to allow for an estimate of assessed values of locally assessed railroad property. The Bureau of Census has no data back of 1956. In 1934, its Census of Wealth, Debt & Taxation lumped railroad and public utility property assessments under the heading, "Other Property." In 1940 the total railroad property assessment was also about 7 billion. See Separate Statement of C. E. Childe, one of a two member Board On Carrier Taxation, H. Doc. 160 at 8-9, 79th Cong., 1st Sess. (1944).

[e] This figure is the yearend 1962 original cost new of property inventoried by the Interstate Commerce Commission and carried on the books of the ICC, as distinguished from the higher original cost carried on the books of carriers which have not gone through reorganization, reduced by accumulated depreciation and amortization. Elements of Value of Property Used in Common-Carrier Service as of December 31, 1962, Class I Line Haul Railways (I. C. C.); Transport Statistics in the United States: 1962, p. 112, Table 158 (ICC). This figure does not include an estimated 2.4 billion of depreciated non-Class I Line Haul railroad property. This figure does include railroad property in Connecticut, Maine, Minnesota, New York and Pennsylvania where railroad property is either exempt or locally assessed. It is assumed that the original cost depreciated of these two categories of property offset each other. The figure does not reflect application of ICC "period" price indexes used to produce the ICC's 1962 reproduction cost new-less-depreciation of approximately 45 billion; whereas, the estimated value by the Bureau of Census of locally assessed real estate is imputed from assessment-sales ratios reflecting inflated "spot" prices of 1961.

[f] "No study of the relation between assessed value and market worth has been attempted for state-assessed property. . . ." II Census of Governments: 1962, Taxable Property Values 9.

U. S. RAILROAD PROPERTY FACTS.

1. Capital Expenditure 1946-1965 . . . . . $22,000,000,000 (note 21 *supra*)



based upon inflated "spot" sales prices. The submission consisted of five columns of figures for each of 31 states. Column 1 presents "railroad ad valorem taxes" totaling $261,061,831. Column 2 presents "all other railroad taxes" totaling $47,808,400. Column 3 presents "percentage of value at which railroad property assessed." (The lower the value of the property the higher the "percentage" or "level of assessment.") Column 4 presents "percentage of value at which property of others assessed." (The higher the value of the property the lower the "percentage" or "level of assessment.") Column 5 presents "estimated reduction in railroad ad valorem taxes if railroad assessments had been made at the same percentage of value as the assessment of property of others" totaling $141,187,830. For Illinois, the AAR submission of June 1960 represented railroad ad valorem taxes for 1957 were $24,000,000; railroad property was alleged to have been assessed at 100%, while the level of assessment of other people's property was stated as 49.97%, producing alleged unconstitutional discrimination in 1957 amounting to $12,000,000.

On September 6, 1960, James N. Ogden, Esq., of Mobile, Alabama, Vice-President and General Counsel of GM&O, Mobile & Ohio RR. and member of the "Law Committee of the American Association of Railroads," without mention that the data had been previously transmitted to the Senate Study Group which was not holding public hearings, revealed that "Column 3" data described above "shows the percent of value at which property is assessed in the several states. This is, of course, a judgment figure and, as indicated heretofore, was carefully checked by at least two responsible railroad tax officers for each state. In all instances where there was a choice, the lowest ratio was used." Proceedings, National Tax Association 378, 385 (1960). On October 10, 1960, the People of Illinois filed in the Supreme Court of Illinois a record on appeal from a uniformity judgment entered in Lee County, Illinois in favor of CB&Q for tax year 1956. On October 28, 1960, GM&O and the largest single holder of its stock, C&NW, filed in the Supreme Court of Illinois records on appeal from two uniformity judgments entered by a Sangamon County trial court in favor of the People for tax year 1957. The GM&O and C&NW appeals were consolidated on November 1, 1960. On December 20, 1960 the brief for the C&NW and GM&O was filed, naming James N. Ogden, Esq., of counsel.

On December 29, 1960, the Senate Special Study Group transmitted its Report as a "Committee Print" to the Committee on Commerce of the United States Senate. This "Preliminary Draft" at 486-7 contained the above described table of data submitted by the AAR in June 1960 and quoted the conclusion of the AAR's submission, but nothing was said about the underlying valuation method for railroad property employed by the AAR. On March 29, 1961, the Supreme Court of Illinois filed its opinions in *People ex rel. Hillison v. CB&Q*, and *People ex rel. Kohorst v. GM&O and C&NW*, 22 Ill. 2d 88, 104 (1961), holding on inadequate records that the property of the three railroads, including by far the two largest in Illinois, had been in 1957 state-assessed at 100% of value. On May 17, 1961, the Supreme Court of Illinois denied petitions for rehearing in *Hillison* and *Kohorst*. On June 26, 1961, the "Preliminary Draft" of the Special Study Group was ordered reprinted without alteration as "*Report of the Committee on Commerce United States Senate by Its Special Study Group on Transportation Policies in the United States (Pursuant to S. Res. 29,151 and 244 of the 85th Congress)*," was so reprinted and numbered Sen. Report. No. 445, 87th Cong., 1st Sess.

The Special Study Group was an outgrowth of extensive hearings conducted in January, 1956 before the Subcommittee on Surface Transportation of the Senate Committee on Commerce. The hearings, entitled *Problems of Railroads*, produced four volumes of testimony. Volume 1 covered the testimony of railroads and it does not include remonstrance about alleged discriminatory property taxes. *Hearings*, 85th Cong., 2nd Sess. (Part 1). The hearings led to enactment of the Transportation Act of 1958. See Sen. Rep. No. 1647, Cal. No. 1678, 85th Cong., 2nd Sess. The subcommittee recommended a special study on long range policy matters but it said nothing about property taxes while recommending other specific subjects of inquiry. *Id.* at 26.

On March 22, 1965, James N. Ogden, Esq., still General Counsel and Vice-President of GM&O (and also AAR spokesman) entered his appearance before this Court in this case.

[illegible] "spot" [illegible] prices. The submission consisted of five columns of figures for each of 31 states. Column 1 presents "railroad ad valorem taxes" totaling $261,061,831. Column 2 presents "all other railroad taxes" totaling $47,608,400. Column 3 presents "percentage of value at which railroad property assessed." (The lower the value of the property the higher the "percentage" or "level of assessment.") Column 4 presents "percentage of value at which property of others assessed." (The higher the value of the property the lower the "percentage" or "level of assessment.") Column 5 presents "estimated reduction in railroad ad valorem taxes if railroad assessments had been made at the same percentage of value as the assessment of property of others" totaling $141,187,839. For Illinois, the AAR submission of June 1960 represented railroad ad valorem taxes for 1957 were $24,922,402; railroad property was alleged to have been assessed at 100%, while the level of assessment of other people's property was stated as 46.76%, producing alleged unconstitutional discrimination in 1957 amounting to $13,922,602.

On September 8, 1960, James H. Ogden, Esq., of Mobile, Alabama, Vice-President and General Counsel of Gulf, Mobile & Ohio Rr. and member of the "Law Committee of the American Association of Railroads," without mention that the data had been previously transmitted to the Senate Study Group which was not holding public hearings, revealed that "Column 3" data described above "shows the percent of value at which property is assessed in the several states. This is, of course, a judgment figure and, as indicated hereinbefore, was carefully checked by at least two responsible railroad tax officers for each state. In all instances where there was a choice, the lowest ratio was used." Proceedings, National Tax Association 376, 386 (1960). On October 10, 1960, the People of Illinois filed in the Supreme Court of Illinois a record on appeal from a uniformity judgment entered in Lee County, Illinois in favor of CB&Q for tax year 1956. On October 20, 1960, GM&O and the largest single holder of its stock, C&NW, filed in the Supreme Court of Illinois records on appeal from two uniformity judgments entered by a Sangamon County trial court in favor of the People for tax year 1957. The GM&O and C&NW appeals were consolidated on November 1, 1960. On December 20, 1960 the brief for the C&NW and GM&O was filed, naming James H. Ogden, Esq., of counsel.

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On March 27, 1962, James H. Ogden, Esq., still General Counsel and Vice-President of GM&O (and also AAR spokesman) entered his appearance before this Court in this case.

not reflect application of ICC "period" price indexes used to produce the ICC's 1962 reproduction cost-new-less-depreciation of approximately 45 billion; whereas the estimated value by the Bureau of Census of locally assessed real estate is imputed from assessment-sales ratios reflecting inflated "spot" prices of 1961.

[f] "No study of the relation between assessed value and market worth has been attempted for state-assessed property. . . ." II Census of Governments: 1962, Taxable Property Values 9.

U. S. RAILROAD PROPERTY FACTS.

1. Capital Expenditure 1946-1965.....$22,000,000,000 (note 21 *supra*)
2. Capital Expenditure 1956-1960.....$ 5,600,000,000 (note 21 *supra*)
3. "Total" investment in "road" and "equipment" property owned by Class I Line Haul Carriers at 12/31/62 (original cost new before depreciation and amortization)....$32,863,427,000 (ICC) (note 21 *supra*)

U. S. RAILROAD PROPERTY TAX FACTS.

1. State Assessments of Railroad Property Decreasing 1956-1964[a]
2. Ad Valorem Taxes Down 23%, 1957-1964, from $353,000,000 to $275,000,000 (AAR)

[a] See note 22 *supra*.

PROPERTY TAX COLLECTIONS IN THE UNITED STATES.[a]

(Billions)

1946.....	4,196	1956.....	14,047
1948.....	6,126	1959.....	14,963
1950.....	7,349	1960.....	15,695
1952.....	8,653	1961.....	16,692
1953.....	975	1962.....	19,064
1954.....	67	1963.....	20,904
1955.....	10,735	1964.....	22,360
1956.....	11,749	1965.....	23,876
1957.....	12,892		

[a] 1946-1962: IV Census of Governments: 1962, Historical Statistics on Government Finances and Employment 38, 39 (fiscal years); 1963-65: Bureau of Census: Quarterly Summary of State & Local Tax Revenues 3 (Oct.-Dec., 1965) (calendar years).

INFLATION.

PRICE AND COST INDICES REFLECTING THE INFLATION WHICH ILLINOIS' DIRECTORS OF REVENUE IGNORED AFTER 1948 BOTH IN EQUALIZING LOCALLY ASSESSED PROPERTY AND IN ASSESSING RAILROAD PROPERTY:

Year	Construction Index[a]	Residences[b]	Commercial & Factory Buildings[b]	Railroad Construction[c]
1946	45.5	37.4	58.	232
1947	54.4	69.5	62.2	258
1948	60.6	78.2	70.3	283
1949	62.7	76.2	71.1	284
1950	67.1	80.3	74.0	288
1951	71.4	86.6	79.9	306
1952	74.9	88.8	82.7	315
1953	78.9	90.4	85.6	326
1954	82.6	89.7	86.6	328
1955	86.8	92.4	89.5	336
1956	91.1	96.5	94.1	362
1957	95.2	98.3	97.5	381
1958	99.9	99.2	99.5	390
1959	104.9	102.5	103.0	398
1960	108.3	104.2	104.7	399
1961	111.5	104.5	105.6	397
1962	114.7	106.3	107.8	396

[a] Engineering News-Record, McGraw Hill Pub. Co. Indices contain 3 material components and 1 labor component.

[b] Frame and Brick Houses. Indices contain components for materials, labor and certain taxes. E. H. Boeckh and Associates, Washington, D. C., reported in Construction Statistics 1915-1964, A Supplement to Construction Review, U. S. Dept. of Commerce (Jan., 1965).

[c] Price Indexes, ICC (Railway Accounts), Pet. Ex. 70. III Exhibits. Based on "period" not "spot" prices.

APPENDIX B.

APPENDIX C.

Post-Mandate Developments in the Trial Court to and Including Friday, April 22, 1966:*

1. September 30, 1965: Petition for Rehearing denied by the Supreme Court of Illinois. II Ill. Sup. Ct. Rec. 217.

2. September 30, 1965: Judgments entered and mandates issued by the Supreme Court of Illinois. II Ill. Sup. Ct. Rec. 172-217.

3. October 1, 1965: Mandates of Supreme Court of Illinois filed in trial court.

4. November 2, 1965: Trial court redocketed the cases and Appellees moved for refund orders. Appellees' Motion for entry of orders reset for November 30, 1965.

5. November 30, 1965: Railroads presented 46 refund orders, with tabulations, causing many of the orders to be file marked without trial court's signature. Appellant given time to examine data; matter reset to January 8, 1966.

6. December 2, 1965: Appellant's response to refund orders reset to January 7, 1966.

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* Based on certified papers filed by Appellees with the Clerk of this Court as stated at 22 n. 13 of Appellees' Motion covering the period October 1, 1965-March 21, 1966. Appellant has filed certified papers covering the period March 21, 1966, to April 22, 1966. The railroads have interspersed the certified papers filed by them with the Clerk with many documents irrelevant to the finality issue. The documents not pertinent to the finality issue are in the record. We invite the Court's attention to the fact that the "Motion" of the railroads filed January 4, 1966, in the trial court, not related to finality, was involved in proceedings, a full transcript of which is at III Ill. Sup. Ct. 718-752. Furthermore, the certified trial court documents filed by the railroads purport to include Peo. Ex. 70. In fact, only the first few pages of that exhibit have been filed. The entire exhibit is in III Exhibits.

7. January 11, 1966: Appellant granted continuance due to hospitalization of State's Attorney. Reset to February 10, 1966.

8. February 21, 1966: Railroads filed "short Statement and Brief" Supporting the Method of Refund Utilized by them in drafting the Orders presented on November 30, 1965.

9. March 21, 1966: Railroads obtained certified copy of trial court proceedings.

10. March 23, 1966: Railroads filed Motion to Dismiss or Affirm in this Court together with certified trial court proceedings.

11. April 20, 1966: Trial court entered orders presented by railroads on November 30, 1965.

12. April 21, 1966: Appellant filed Notices of Appeal to Supreme Court of Illinois from April 20, 1966, orders entered by trial court solely to preserve questions presented to this Court in the Jurisdictional Statement. Trial Court entered orders staying the April 20, 1966 orders.

APPENDIX D.

Prototype of 46 Notices of Appeal to the Supreme Court of Illinois filed by Appellant on April 21, 1966, from 46 Orders entered by the Trial Court, on April 20, 1966, raising the same questions now presented by Appellant to this Court.

Appeal to the Supreme Court of Illinois From the Third Judicial Circuit, Madison County, Illinois.

In the Matter of the Application of the People of the State of Illinois ex rel George Musso, Treasurer and Ex Officio Collector of Taxes of Madison County, Illinois, Applicant-Appellant, vs. Chicago, Burlington & Quincy Railroad Co., Objector-Appellee.	1957 Tax Objection.

Notice of Appeal.

Appeal is hereby taken to the Supreme Court of Illinois from the parts of the Order of the Circuit Court entered on April 20, 1966, which utilize or rely on the determination that the state assessment of railroad operating property is equal to 100% of fair cash value. Those parts of the Order which so rely are findings numbered 2, 3, 4, 5, 6, 7, 8, 9, and ordering paragraphs numbered 1, 2, 3, 4, 5, and attached tabulations.

Appellant contends that the mandate and the judgment of the Supreme Court upon which the mandate is based are violative of Article IX, Sec. I of the Illinois Constitution and the due process and equal protection clauses of

the Fourteenth Amendment to the United States Constitution for the reasons set forth in the Jurisdictional Statement filed in the United States Supreme Court on February 21, 1966, in No. 1046 on the Appellate Docket for the October 1965 Term.

Appellant desires that the Supreme Court of Illinois reverse and set aside the order of April 20, 1966, and direct the trial court to enter an order of refund in all respects identical to the April 20, 1966, order except that the order shall utilize the trial court's August 20, 1964, determination of the level of assessment of the railroad's operating property.

Appellant files this Notice of Appeal pursuant to Ill. Rev. Stat. 1965, C. 110, 101.33.

Joseph R. Bartylak (s)
Joseph R. Bartylak, State's Attorney,
Attorney for Appellant,
Court House,
Edwardsville, Illinois.

Of Counsel:
Burton C. Bernard,
Special Assistant State's Attorney.

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MAY 26 1966
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 1048.

PEOPLE OF THE STATE OF ILLINOIS ex rel. GEORGE MUSSO, Madison County Treasurer and Ex-Officio Collector of Taxes of Madison County, Illinois,
Appellant,

vs.

CHICAGO, BURLINGTON AND QUINCY RR. CO., CHICAGO & NORTHWESTERN RR. CO., GULF, MOBILE AND OHIO RR. CO., CHICAGO AND EASTERN ILLINOIS RR. CO., ILLINOIS CENTRAL RR. CO., NEW YORK CENTRAL RR. CO., NEW YORK, CHICAGO & ST. LOUIS RR. CO., WABASH RR. CO., PENNSYLVANIA RR. CO., ILLINOIS TERMINAL RR. CO., ALTON & SOUTHERN RR. CO., and TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Appellees.

On Appeal from the Supreme Court of Illinois.

APPELLANT'S PETITION FOR REHEARING.

JOSEPH R. BARTYLAK
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BURTON C. BERNARD
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Attorneys for Appellant.

Of Counsel:
DICK H. MUDGE, JR.
State's Attorney, Madison County, 1956-1964
Edwardsville, Illinois.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 1046.

PEOPLE OF THE STATE OF ILLINOIS ex rel. GEORGE MUSSO, Madison County Treasurer and Ex-Officio Collector of Taxes of Madison County, Illinois,
Appellant,

vs.

CHICAGO, BURLINGTON AND QUINCY RR. CO., CHICAGO & NORTHWESTERN RR. CO., GULF, MOBILE AND OHIO RR. CO., CHICAGO AND EASTERN ILLINOIS RR. CO., ILLINOIS CENTRAL RR. CO., NEW YORK CENTRAL RR. CO., NEW YORK, CHICAGO & ST. LOUIS RR. CO., WABASH RR. CO., PENNSYLVANIA RR. CO., ILLINOIS TERMINAL RR. CO., ALTON & SOUTHERN RR. CO., and TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Appellees.

On Appeal from the Supreme Court of Illinois.

APPELLANT'S PETITION FOR REHEARING.

Comes now the Appellant and respectfully petitions the Court to grant a rehearing in this cause, note jurisdiction and confer plenary consideration on the questions presented. If the Court will not do so, Appellant prays the Court to state whether its decision of May 16, 1966, was

based upon the procedural point of lack of finality of the judgments appealed. Appellant represents:

1. The decision of the Court reads:

> "The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied."

2. The two bases of Appellees' Motion to Dismiss are (a) no federal question is presented; (b) the judgments appealed to this Court lack finality. Either of these points may underly the decision.

3. There are presently pending in the state court below appeals to the Supreme Court of Illinois from judgments of the Circuit Court of Madison County entered on April 20, 1966, which appeals, perfected by the Appellant here, raise the same federal questions as those presented to this Court in this appeal. (See pp. 78-84 of Appellant's Brief in Opposition to Appellees' Motion to Dismiss or Affirm.)

4. If the basis of this Court's May 16, 1966, decision is lack of finality of the judgments below, a procedural matter, the Appellant can move forward to conclude the pending appeals in the state court and obtain unquestionably final judgments preparatory to perfecting another appeal to this Court. If the basis of the May 16, 1966, decision is the absence of a federal question, there is no reason to incur the effort, expense and delay entailed in pursuing the pending appeals below.

5. The distribution by the tax collector of approximately two million dollars turns on the outcome of this litigation and interest of about $8,000 a month is accruing on the judgments entered by the trial court on April 20, 1966.

CONCLUSION.

Absent plenary consideration, clarification of the basis of this Court's May 16, 1966, decision may preclude multiple appeals to this Court.

Respectfully submitted,

JOSEPH R. BARTYLAK
State's Attorney, Madison County
405 East Main
Collinsville, Illinois

BURTON C. BERNARD
Special Assistant State's Attorney
State Loan Building,
Granite City, Illinois
Attorneys for Appellant

Of Counsel:

DICK H. MUDGE, JR.
State's Attorney, Madison County, 1956-1964
Edwardsville, Illinois

Certificate.

Burton C. Bernard, one of counsel for the Appellant, does hereby certify that this Petition is presented in good faith and not for delay.

Burton C. Bernard

May 25, 1966